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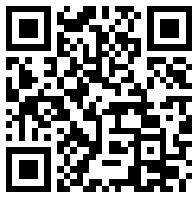

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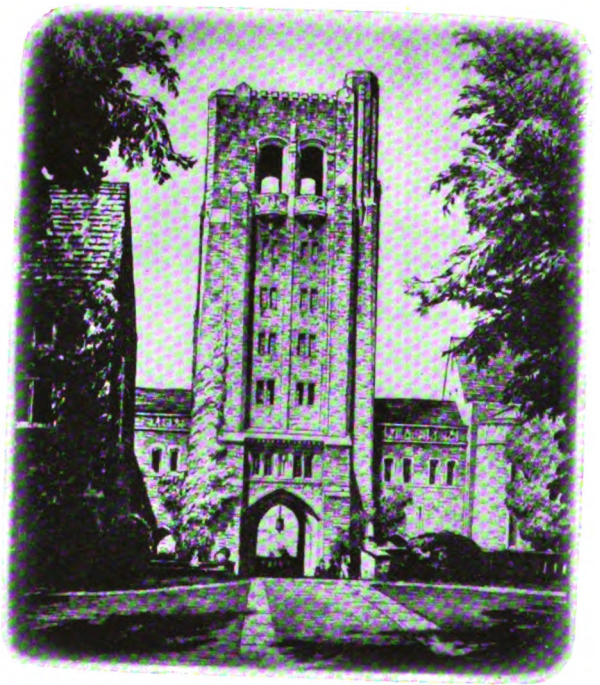

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EAST AFRICA PROTECTORATE

LAW REPORTS

CONTAINING

CASES DETERMINED BY THE HIGH COURT OF EAST AFRICA,

AND BY

THE COURT OF APPEAL FOR EASTERN AFRICA,

AND BY

THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL ON APPEAL FROM THAT COURT.

VOLUME V.

PART II. 1914.

COMPILED BY

R. W. HAMILTON,

Chief Justice, East Africa Protectorate.

NAIROBI,

PRINTED BY THE GOVERNMENT PRINTER.

1915

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Explanation of Abbreviations and References.

A. D. C.	...	Assistant District Commissioner.
C. A.	...	Civil Appeal.
Crt. of Appeal	...	Court of Appeal for Eastern Africa.
C. P. C.	...	Indian Civil Procedure Code.
Cr. A.	...	Criminal Appeal.
Cr. C.	...	Criminal Confirmation.
Cr. P. C.	...	Indian Criminal Procedure Code.
Cr. R.	...	Criminal Revision.
D. C.	...	District Commissioner.
D. R.	...	District Registry
E. A. L. R.	...	East Africa Law Reports
I.	...	Insolvency.
I. P. C.	...	Indian Penal Code.
N.K.R.O.	...	Nakuru.
N.R.B.	...	Nairobi.
O. C.	...	Original Civil Jurisdiction.
O. Cr.	...	Original Criminal Jurisdiction.
O.-in-C.	...	Order-in-Council.
P. C.	...	Privy Council.
T. M.	...	Town Magistrate.

One number placed above another, *e.g.*, $\frac{1}{1910}$ denotes the serial number of a case and its year.

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ORIGINAL CIVIL.

Before BARTH, J.

JAMES *v.* Ross. O.C. $\frac{2}{1912}$ NAKURU (January, 1913).

Agreement to lease immovable property—Lease not executed nor registered—Rights of lessor where term and rent reserved are not disputed—Transfer of Property Act, Sections 106, 107.

Held:—The term and rent being admitted by the Defendant and no notice to quit having been given the Defendant is liable for rent for the whole term notwithstanding the fact that the lease was neither executed nor registered.

C. G. Salmon, for Plaintiff.

H. B. Kendall, for Defendant.

The facts appear sufficiently from the judgment following :—

BARTH, J.—The Plaintiff is seeking to recover Rs. 975/- for the rent of a farm, No. 35, situated in the Nakuru district.

It has subsequently been agreed that not more than Rs. 825 can be claimed.

The action was originally based on a lease between the parties, but it was discovered that the lease had not only not been registered but had not been executed by the Defendant, the lessee. The Defendant has, however, consented to the action being tried without an amendment of the plaint. It seems that on a verbal agreement being made between the parties for the Plaintiff to sublet the farm to the Defendant for five years at £10 per annum with an increase of £5 annually it was arranged that the Plaintiff instruct a lawyer to draft a lease, each party to pay half the legal expenses. This was done and the draft was signed by the Plaintiff and sent to the Defendant, who on the advice of his lawyer did not execute it, but strange to say did not communicate his objections either by himself or by his lawyer to the Plaintiff. The Plaintiff, equally strangely, appears not to have worried about getting the executed counterpart into his possession but rested content under the impression that it had been executed.

The Defendant entered into possession and paid rent regularly until November, 1910, leaving due under the terms arranged Rs.825.

There has been no demand for rent from the date of the last payment, *i.e.*, August, 1910, until 21st September, 1912.

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JAMES v. ROSS. 2 O.C. 1912

The Defendant admits the term of five years and the rent payable, but relies on two letters as evidence that the Plaintiff accepted a surrender of the farm in November, 1910.

The first is a letter from the Plaintiff dated 7th November, 1910, to Mr. Iway asking him to ascertain if the Defendant was agreeable to hand over the farm if the Plaintiff agreed to forego all future rent, and the second is a letter from the Defendant to Plaintiff saying he is willing to give up the farm and improvements, provided that the Plaintiff allowed Mr. Heppes to take off any crops he had on the land.

It is obvious that these letters cannot possibly form an agreement.

Mr. Iway was not authorised to make an offer, and even if he were the acceptance is expressed subject to a condition that detracts from its value as an acceptance of the offer which it is alleged by the defence Mr. Iway was authorised to make.

It is clear from Exhibit 3*, which the Defendant has sworn, is wrongly dated and ought to be dated 3rd December, 1909, that the Defendant considered himself bound at that date and still considered himself bound in November, 1910, *vide* Exhibit 2*.

As the term and rent are admitted by the Defendant and there has been no notice to quit on either side it must be taken, I am of the opinion, that the Defendant was in possession until the end of the term. I do not think the fact that the lease was neither executed nor registered affects the contract which is admitted between the parties. It may be that the Defendant could have given notice under Section 106, Transfer of Property Act.

That the Plaintiff has not demanded rent since the last payment cannot possibly preclude him from claiming it now.

I give judgment for the Plaintiff for Rs.825 and costs on that amount.

(*Judgment for Plaintiff.*)

---

* Letters in which Defendant asked to be relieved of his obligations.

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APPELLATE CIVIL.

Before BARTH, J.

ORTLEPP, *Appellant* orig. *Defendant* *v.* SMITH, MUNDELL & Co. *Respondents* orig. *Plaintiffs* C.A. $\frac{44}{1912}$ (January, 1913).

Landlord and tenant—Indian Transfer of Property Act, Section 106, notice to quit—Tenant remaining on after notice of alteration of terms of tenancy—Lodger.

O—— leased two rooms as a lodger in a house from the L.T. Syndicate at Rs.10 a month. The Syndicate sold their house and business to S. M. and Co., who notified O—— that he could remain on till the end of the month at his original rent, but that after that date the rent would be raised to Rs.1 a day or Rs.30 a month O—— remained on for the following month and tendered Rs.10 rent and demanded a month's notice before the rent could be raised or he could be given notice to quit.

Held:—On appeal confirming the judgment of the subordinate court that the Respondents were not bound by the agreement between the tenant and his original landlord as by staying on he had agreed to the rent of Rs.1 a day, which was not a monthly tenancy under which the tenant could require 15 days' notice.

C. G. Salmon, for Appellants.

A. J. Barry, for Respondent.

BARTH, J.—The Appellant is seeking to reverse a judgment of the District Commissioner at Eldoret in an action brought against him by the Respondents for the balance of the rent of two rooms in a building belonging to the Respondents.

The Appellant rented two rooms from the Respondents' predecessors in title at Rs.5/- per mensem each.

The Respondents purchased the building with the business and informed the Appellant that his rent would be raised at the end of the month, *i.e.*, October 18th, to Rs.30/- per mensem. This intimation was given soon after Respondents took over the business.

Section 106 of the Transfer of Property Act has been relied on by the Appellant, who demands at least 15 days' notice.

I am of the opinion that there was no contract between the Appellant and Respondents to rent the rooms monthly at Rs.10/- per mensem.

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ORTLEPP v. SMITH, MUNDELL & Co. C.A. 41/1912

The Respondents as soon as they could informed the Appellant on what terms he could continue his tenancy, *i.e.*, Rs.10/- to the end of the month and then Rs. 1/- per diem or Rs 30/- per mensem onwards. The Appellant remained on, thereby presumably agreeing to the Respondents' terms.

It is clear, I think, from the evidence that the Respondents had no notice of any agreement with Mr. Kemp and the Appellant and it is equally clear, I think, that the contract made by the Appellant with Mr. Kemp had no effect on the Respondents.

The appeal is dismissed with costs.

(*Appeal dismissed.*)

ORIGINAL CIVIL.

Before BARTH, J.

GRAY *v.* COCKER. O.C. 28/1912 D.R., N.R.B.†

combined with the cross action of

COCKER *v.* GRAY. O.C. 54/1912 D.R., NAIROBI (February, 1913).

Arbitration—Agreement to refer where no suit pending—Agreement not filed in Court—Order in Council, 1897, Art. 37—Jurisdiction of the Court.

G—— and C—— were originally partners under a deed according to which any differences between them were to be referred to arbitration. Differences arose and the matters in dispute were referred to an arbitrator, who made an award. No submission to arbitration was however first filed in the Court. In order to enforce the award G—— filed an action and C—— filed a cross action to have the award set aside.

Held:—The Court has no jurisdiction to enforce an award where the reference to arbitration has not first been filed in Court.

E. K. Figgis, for the Defendant:—

The Court has no jurisdiction where a reference to arbitration has not been first filed in Court. The Order in Council, 1897,

† See page 16.

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Art. 37, has not been repealed by the Order in Council, 1902. See also the provisions of Section 523 of the Civil Procedure Code and the case of *Dhani Ram* v. *Rasool Bux* (1).

B. G. Allen, for Plaintiff:—

We are not precluded from bringing an ordinary action to enforce the award. This is similar to the case of *Allen v. Tonks* (2) decided in this Court.

Figgis—That case deals with a different point.

BARTH, J.—This is an action brought by the Plaintiff against the Defendant for the enforcement of an award under an arbitration held between the parties in pursuance of an agreement dated the 27th November, 1911. It has been contended by the Defendant as a preliminary point that the Court has no jurisdiction because the submission to arbitration was not filed and Section 37 of the East Africa Order in Council, 1897, has been relied on in support of such contention and *Dhani Ram and others* v. *Rasool Bux* (3) has been cited in favour of such contention.

The Plaintiff's case is that he is not debarred from bringing an ordinary action to enforce the award and cites an unreported case of *Allen* v. *Tonks* (4).

I will first of all deal with the case of *Allen* v. *Tonks*. The Plaintiff's argument in that case was that the suit was not on the award, but was a suit for an account after a dissolution of partnership, and the Court held that it had jurisdiction only so far as the Plaintiff sought for an account and a winding up of the partnership: the suit was not framed as an action to enforce an award and was not so regarded by the Court.

Judge Cator, sitting as a Judge of the Protectorate Court, in 1898, held in *Noorbhoy, Alibhoy & Co.* v. *Isaji Alibhoy* (5) that Article 37 of the East Africa Order in Council, 1897, excluded the provisions of the Civil Procedure Code dealing with arbitrations except those dealing with compulsory orders for arbitration.

In 1902 the East Africa Order in Council, 1902, was promulgated and enacted, *inter alia*, that the Order in Council, 1897, was repealed, but that where other provision was not made by Ordinance that any law, practice or procedure established by or under the repealed order should remain in force until other provision was made (Article 28). No other provision dealing with arbitration has been made to the best of my knowledge and belief.

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(1) E. A. L. R., III., 21.

(2) High Court Civil case 6/1907 D R., Nairobi, unreported.

(3) Supra. (4) Supra. (5) E.A.L.R., I., 5.

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GRAY v. COCKER. O.C. 28/1912

COCKER v. GRAY. O.C. 54/1912

In 1908 in the case of *Dhani Ram and others* v. *Rasool Bux*, Hamilton, P. J. of H.M. High Court of East Africa, held that Article 37, sub-section (*a*), of the East Africa Order in Council, 1897, related only to "those agreements where there had been no intervention by a Court such as are contemplated by Section 523, Civil Procedure Code," meaning thereby, I think, that Article 37 covered the species of agreement referred to in Section 523, Civil Procedure Code. The learned Principal Judge went on further to say that he was of the opinion that Article 37 applies only to agreements to refer to arbitration where there is no suit pending.

Now Article 37 provides in sub-section (*a*) that every agreement for reference to arbitration may, on the application of any party, be filed for execution in the proper office of the Court, and in sub-section (*b*) provides that the Court shall thereupon have authority to enforce the agreement and the award made thereunder, and control and regulate the proceedings before and after the award in such manner and on such terms as the Court may think fit. I am of the opinion that the power of the Court to deal with an award of the nature of the one now before it is regulated by Article 37, it being an award under a reference to arbitration where there was no suit pending. The filing of the agreement is permissive, but I am of the opinion that the proper construction of the article is that unless the agreement is filed, then the Court cannot exercise the powers given it under sub-section (*b*).

The agreement for reference to arbitration in this case has not been filed, and as I am of the opinion that such filing must be preliminary to any action taken under the arbitration proceedings; in my judgment I have no jurisdiction to hear an action brought to enforce an award given under such arbitration proceedings. The suit is, therefore, dismissed with costs. The effect of this judgment is to dismiss Civil Case No. 54 of 1912 (District Registry, Nairobi).

(*Both suits dismissed.*)

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CRIMINAL CONFIRMATION.

Before HAMILTON, C.J.

REX *v.* OMUSSA WA MUKUO. Cr.C. $\frac{54}{1913}$ (February, 1913).

Indian Penal Code, Sections 379 and 511—Attempt to commit theft—Preparation as distinguished from attempt—Criminal trespass, Section 441—Property in the possession of another.

Held:—Hiding in order to commit theft is merely preparation for the commission of the offence and not an attempt to commit theft.

Held also:—Land adjacent to a native village is not by reason merely of its position property in the possession of another so as to render a person found there with the intention of committing an offence guilty of the offence of criminal trespass.

The facts appear sufficiently in the judgment:—

HAMILTON, C.J.—In this case the accused, who was caught hiding outside a village close to the village fence, admitted that he had so concealed himself with the intention of stealing cattle. On these facts he was convicted of an attempt to commit theft and sentenced accordingly.

The Attorney-General, to whom the papers have been submitted, is not prepared to support the conviction, and, in my opinion, it cannot be supported. The dividing line between mere preparation for the commission of an offence and an attempt to commit that offence, is often difficult to follow; but the accused in this case does not seem to have crossed it.

A man who buys a gun in order to shoot someone, or who having bought the gun takes up a position behind a hedge in the hope that that person will pass along the road within his range, cannot be convicted of an attempt to wound or murder unless and until he does some act towards the actual commission of the offence, such as aiming and pressing the trigger. The man he intends to shoot may not pass along the road, or he himself may alter his mind, or go to sleep or die suddenly and nothing further may happen beyond the fact that he had made preparation. So here the evidence does not go beyond the fact that the accused was caught hiding, apparently before he had had the opportunity to commence active operations.

The Attorney-General has, however, suggested for consideration that the accused might be convicted of "criminal trespass." But for

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REX v. OMUSSA WA MUKUO. Cr.C. 54/1913

a conviction on such a charge it must be proved that "he entered upon property in the possession of another with intent to commit an offence."

Here the intent is admitted, and it remains therefore only to consider whether the land outside the village fence can be held to be "property in the possession of another." Land adjacent to a village is, undoubtedly, used by the inhabitants of that village, that is, they may have rights with regard to it that strangers would not have, but can such rights he said to give them possession of the land so as to make the entry thereon of any other person than the inhabitants of that particular village a trespass? In the absence of express evidence as to such possession I should be unwilling to lay down as a broad proposition that a stranger found on land adjacent to a village, of which he was not an inhabitant, was necessarily a trespasser. A general ruling to this effect would, in my opinion, entail consequences of such a far reaching nature as seriously to modify the provisions of the Indian Penal Code with regard to the law of trespass, and I am not prepared to adopt it in this case.

I therefore reverse the finding and sentence and acquit the accused of the charge.

This finding will not, however, prevent proceedings being instituted against him under Chapter VIII. of the Criminal Procedure Code.

(*Accused acquitted.*)

CRIMINAL DIVISION.

Before BARTH, J.

REX *v.* NYAMBI AND OTHERS CR.R. 5/1913 (March, 1913).

Indian Penal Code, Section 65—Imprisonment in default of payment of fine—Criminal Procedure Code Section 33, limits of powers of magistrates.

Held:—A sentence of six months' imprisonment in default of payment of fine is in excess of the powers of an Assistant District Commissioner, who is a third class magistrate.

The accused was convicted by the A.D.C. Kitui of the offence of robbery and sentenced in the following terms:—"Accused No. 1

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five months' rigorous imprisonment and a fine of Rs.50 or in default six months."

The High Court revised the sentence on the basis that the term of imprisonment in default was intended to be six months, though it subsequently transpired that this reading was due to the ambiguous wording of the sentence and was not the intention of the magistrate.

The order of the High Court was as follows :—

BARTH, J.—The magistrate can only award as a punishment, in default of payment of a fine, imprisonment for a term which does not exceed one quarter of the maximum term of imprisonment with which the offence is punishable (Section 65, Indian Penal Code), and this power is further limited by Section 33, Criminal Procedure Code, which provides that the term of imprisonment awarded in default of payment of a fine shall not exceed one quarter of the period of imprisonment which the magistrate is competent to inflict as a punishment for the offence. Magistrates holding 3rd Class Subordinate Courts can only inflict six months' imprisonment; they can therefore only impose one and a half months as imprisonment in default of payment of a fine.

I therefore reduce the six months' imprisonment imposed on accused Nos. 1 and 2 in default of payment of their fines to one and a half month's imprisonment.

(*Imprisonment in default reduced.*)

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APPELLATE CIVIL.

Before BARTH, J.

LONDIANI DEVELOPMENT SYNDICATE *v.* SMUTS. C.A. $\frac{5}{1913}$

SMUTS *v.* LONDIANI DEVELOPMENT SYNDICATE. C.A. $\frac{6}{1913}$

Combined cross appeals from order of District Registrar, Nairobi (March, 1913).

Commission to take evidence of witness resident abroad—Necessary document referred to in affidavit not exhibited—Grounds for ordering issue of commission.

Held:—The party applying for the issue of a commission must produce documents on which they rely for the purpose of showing conclusively that the commission is necessary for the proper adjudication of issues between the parties.

B. G. Allen, for Londiani Development Syndicate.

E. K. Figgis, for Smuts.

BARTH, J.—These are cross appeals arising out of an Order by the District Registrar granting the Defendants leave to issue a commission for taking the evidence of one Wm. Grierson in England. The costs of the commission were to be payable by the Defendants for reasons set out in the Order.

The Defendants have appealed against that part of the Order dealing with costs and the Plaintiff has appealed against that part of the Order granting the commission.

From the affidavit in support of the application for a commission before the District Registrar a document is mentioned, but not exhibited, the contents of which are relied on to support the statement that the Defendants have a good defence.

In my opinion that document should have been exhibited in order to give the District Registrar some idea if the costs of a commission were justified. From the evidence already given in the case, I consider it extremely doubtful if Mr. Grierson's evidence can be of any use to the Defendants.

A commission in any event must involve both parties in considerable expense, and I am of the opinion should not be issued unless it is conclusively shown that it is necessary for the proper adjudication of the issues between the parties. I am of the opinion that in this case the commission asked for can only result in delay and be of no real use to the Defendants. I therefore allow appeal No. 6 with costs and dismiss appeal No. 5 with costs.

(*Order of District Registrar reversed.*)

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ORIGINAL CIVIL.

Before BARTH, J.

OGDENS AND MADELEYS LTD. *v.* ALLOIS SCHWEIGER & Co. O.C. $\frac{78}{1912}$
(April, 1913).

Infringement of Trade Mark—Importation from Europe to the order of a customer in East Africa—Liability of importer for innocent infringement of unregistered Trade Mark—Costs where the importer has not been diligent in rectifying error.

Held:—Where a person orders goods from Europe through a European firm in Mombasa on the terms of delivery of shipping documents by the Bank on the orderer accepting a draft for cost insurance and freight, the European firm in Mombasa is the importer of the goods.

Held also:—The fact that the Trade Mark was unregistered does not deprive the Plaintiff of his remedy if his rights to the use of that Trade Mark have been invaded and he has thereby suffered damage.

Held also:—Even though the invasion of the Plaintiff's rights has been innocent on the part of the Defendant, the Defendant will be ordered to pay costs unless he does all in his power to remedy the wrong he has caused.

C. M. Dalal, for Plaintiff.

R. M. Byron, for Defendant.

The facts are sufficiently set out in the judgment following :—

BARTH, J.—The Plaintiffs in this action are seeking, among other claims, an injunction to restrain the Defendants from importing goods with the Plaintiffs' name and mark on the packages and damages.

The facts admitted or proved are that the Plaintiffs on or about 15th October, 1912, discovered that cups and saucers were for sale in the bazaar with the Plaintiffs' name and mark on the packages. Such packages were bought by the Plaintiffs or their Agents down to 5th December, 1912.

It is admitted that these goods formed part of an indent on the Defendants by Haji Abdul Relman for two cases of cups and saucers.

The indent was on the ordinary terms of the delivery of shipping documents by the Bank to the indentor on his acceptance of a draft for the cost, insurance and freight.

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It has been argued that this is not an importation or sale by the Defendants. I am, however, of the opinion that the facts do constitute an importation and sale of the goods by the Defendants to their customers. There is nothing to show anything to the contrary: the cases bear the Defendants' name and the name of nobody else, and the indentor does not get delivery until he has accepted a draft drawn by the Defendants. The contract was, undoubtedly, between the Defendants and their customers.

It is an admitted fact that the labels were put on the packages contained in one case, at least, of cups and saucers imported by the Defendants by a mistake of the manufacturers in Germany.

On it being discovered that the Defendants had sold cups and saucers packed with the Plaintiffs' name and mark, the Plaintiffs wrote to them and an acrimonious correspondence resulted. At a suggestion from the Court the Plaintiffs offered to settle the case on the footing of an undertaking not to repeat the offence and the payment of the Plaintiffs' party and party costs—an offer which was somewhat unreasonably refused.

The Plaintiffs filed their action on the 26th October. Mr. Robinson has said that if an attempt to remove the labels had been made he would not have come to Court. The Defendants' manager, Homji, states that instructions were given to their broker to remove the labels on the 18th or 19th October. The broker, Kassum, states that Fazal, Molu Tejpar's brother and partner, who has not been produced before the Court, removed some labels from two or three packages and promised to remove them from the other packages, and subsequently about eight or ten days after Kassum had received his instructions said he had done it. Yet packages with the labels on were bought on December 5th by the Plaintiffs from Molu Tejpar.

The Plaintiffs have claimed a peculiar property in the shape and design of the cups and saucers, but have not succeeded in proving it.

The Plaintiffs have admitted that the goods were not seen by the Defendants before they were sold and that the shipment sample bore no label. They have also abandoned their claim for an account and profits and the delivery of the cups and saucers. They also do not press for damages.

The Defendants were in this case innocent of any intention to do wrong. and I am of the opinion that if they give an undertaking not to import goods packed with the Plaintiffs' labels in future, it will be unnecessary for an injunction to be granted.

The Defendants have argued that the action does not lie because the Plaintiffs' mark is not registered.

It is scarcely necessary to deal with such a proposition of law. Every one has a right to the use of his trade name and if anyone

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sells goods with the name of a trader knowing that they are not the goods of such trader, then as a rule he does that which will injure the trader and that which the law will redress.

The case has been argued by the Defendants almost entirely on the question of costs. In most of the cases cited* the infringement was innocent and the Defendants admitted liability and sought by every means in their power to put matters right. In this case a very abortive attempt was made by the Defendants to remove the offending labels, an undertaking which does not seem to present insuperable difficulties, and the Defendants adopted a far from conciliatory attitude in their correspondence and, in fact, denied liability. The Plaintiffs had a cause of action and at the date the suit was filed were justified in my opinion in thinking it was necessary to invoke the jurisdiction of the Court in their behalf. I am of the opinion that the Defendants should pay the Plaintiff's costs.

(*Judgment for Plaintiff for costs.*)

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* Millington & Fox, 34 Bearan 595.
Welch & Knott, 4 K. & J. 747.
Upmann & Elkan, XLI. L.J.Eq. 246.
Rose & Loftus XLVII. L.J.Ch. 579
Jenkins & Hope, LXV. L.J.Ch. 249.

CRIMINAL CONFIRMATION.

Before BARTH, J.

REX *v.* KIRIAMA ARAP CHIRONO. Cr.C. $\frac{145}{1913}$ (April, 1913).

Indian Penal Code, Section 65—Imprisonment in default of payment of fine where a substantive sentence of imprisonment has been imposed.

Held:—A Court should not attempt to increase the maximum term of imprisonment allowed by law by adding a fine and the maximum term of imprisonment in default of payment.

The accused was convicted by the D.C. Nandi of an offence under Section 379, I.P.C., for which the maximum term of imprisonment is three years. He was sentenced to three years rigorous imprisonment and fined Rs. 150 with a further term of nine months

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REX v. KIARAMA ARAP CHIRONO. Cr.C. 145/1913

rigorous imprisonment in default, this term being also the maximum. On the sentence being submitted to the High Court for confirmation the following order was passed:—

BARTH, J.—The sentence in this case is confirmed, but this Court views with disapprobation what appears to be an attempt to raise the maximum imprisonment provided for an offence by the infliction of the maximum sentence of imprisonment together with a fine and the maximum penalty in default of payment of the fine.

If the maximum sentence of imprisonment provided is inadequate for this class of offence then the proper course is to amend the law.

A fine, if levied, is often an excellent form of punishment in native cases; but when a fine is inflicted with a severe sentence of imprisonment in default of payment, then the substantive sentence of imprisonment should ordinarily not be the maximum which can be given, but should be proportionately reduced.

(*Sentence confirmed.*)

APPELLATE CIVIL.

Before BARTH, J.

ALLOIS SCHWEIGER & Co. *v.* ABDULLA KANJI & Co.

Appellants orig. *Plaintiffs*. *Respondents* orig. *Defendants*.

C.A. 9/1913 (April, 1913).

Indian Contract Act, Section 118—Goods not up to sample, right to refuse to take delivery—Goods ordered on indent against the acceptance of a draft.

The Defendants ordered by indent three consignments of blankets of Plaintiffs to be delivered on acceptance by them of bills for payment. The goods were admittedly not up to sample and Defendants, who had asked for and failed to obtain shipment samples, refused delivery of the second consignment and to sign the bill. The Plaintiffs thereupon sued the Defendants for damages for refusing to accept the goods and take up the bill.

Held:—The Defendants were under Section 118 of the Contract Act entitled to refuse to take delivery.

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R. M. Byron, for the Appellants.

The Plaintiff had no right to do anything till he had accepted the bill. This was a condition precedent. He referred to Sections 51, 54 of the Contract Act.

C. M. Dalal, for the Respondents.

The Respondents refused to take delivery without shipment samples, and it was subsequently discovered the goods were not up to sample. They had the right to refuse under Section 118, Contract Act.

BARTH, J.—This is an appeal by the Plaintiffs in an action before the Town Magistrate's Court at Mombasa to recover damages for breach of a contract to buy two bales of cotton blankets from them.

The blankets were ordered on an indent and the shipping documents were to be delivered to the Defendants by the Standard Bank on the acceptance of a draft for their value by the Defendants.

The blankets which are the basis of the action formed the second consignment out of three under the terms of the indent.

The first consigment were delivered on the acceptance of the draft. When the second consignment arrived, the Defendants refused to accept the draft originally on the ground that they wanted to see a shipment sample.

It is admitted that no shipment samples were sent to the Defendants.

It was subsequently discovered, and it is admitted by the Plaintiffs, that the blankets were not such as the Plaintiffs had contracted to deliver.

The Appellants' main contention is that under the contract it was obligatory on the part of the Defendants to accept the draft before they could refuse delivery or claim damages or do anything else to adjust the breach.

In view of the fact that the blankets were admittedly sold under an implied warranty that they would be up to sample and that there was admittedly a breach of the contract for which in various other cases the Appellants had allowed the indentors compensation and also in view of the provisions of Section 118, Contract Act, the Appellants' contention seems to be of a most extraordinary nature.

The learned Advocate for the Plaintiffs has endeavoured to argue that the acceptance of the draft is a condition, which must be fulfilled before the Defendants can do anything to recover for a breach of the contract or to refuse to take delivery.

Such a contention so far as this case is concerned appears to me to be ridiculous. Section 118, Contract Act, clearly gives the

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ALLOIS SCHWEIGER & Co. *v.* ABDULLA KANJI & Co. C.A. $\frac{9}{1913}$

Defendants a right to refuse to take delivery and it is nonsense to say that they must first put themselves into a worse position by accepting a draft and thus rendering themselves liable to pay cash for goods, the delivery of which they have refused to take, and unnecessarily complicating the issues which would ultimately have to be tried between the parties.

The appeal is dismissed with costs.

(*Appeal dismissed.*)

ORIGINAL CIVIL.

Before HAMILTON, C.J.

GRAY *v.* COCKER. O.C. $\frac{22}{1913}$ (May, 1913) †

Partnership in which partners are bound to refer disputes to arbitration—Action by one of the partners without reference—Jurisdiction of the Court to entertain the action.

G—— and C—— were partners bound under their deed of partnership to refer all matters in dispute between them to arbitration. Disputes arose which were referred to arbitration, but owing to the reference not having been first filed in Court, it was held that the arbitration was invalid and the award unenforceable. G—— then sued C—— for an account, but C—— objected that the suit could not be entertained by the Court till there had been a valid reference to arbitration followed by an enforceable award.

Held:—That the arbitration proceedings being invalid the parties were put back in their original position and that the suit would not lie, the parties being still bound to refer to arbitration.

E. K. Figgis, for the Defendant.

It is true that one of the conditions of reference to arbitration was dissolution of partnership but, the arbitration having proved invalid, the parties are still bound by their original agreement.

B. G. Allen, for the Plaintiff.

We agreed to refer to arbitration and having done so, though ineffectually, we are now at liberty to sue.

† See page 4.

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HAMILTON, C.J.—The parties entered into partnership, one of the conditions being that any difference between them should be referred to arbitration.

After a time they agreed to dissolve partnership on certain conditions and terms of reference to arbitration, with the proviso that the final award should, if necessary, be made an order of Court.

An award was given and it became necessary for Plaintiff to sue to enforce it, but he failed in his action, as owing to the agreement for reference to arbitration not having been filed in Court he was unable to make it an order of Court.

The Plaintiff thereupon filed the present suit for an account of the partnership to be taken. The Defendant in his pleadings admitted that the question of his liability, if any, must be settled by the Court, and asked for an account from Plaintiff, but he has argued before me by his counsel, Mr. Figgis, that the Court has no jurisdiction to hear the case as the parties are still bound by their agreement to refer to arbitration.

As the parties agreed to dissolve on the terms of obtaining a valid award at arbitration, and have in fact failed in their object owing to incorrect procedure, I am of opinion that the terms on which the parties agreed to refer including dissolution are discharged and the parties are put back in their original position and are still bound by the partnership agreement to refer their differences to arbitration.

That being so the Court has at present no jurisdiction to order an account to be taken.

(*Action dismissed.*)

COURT OF APPEAL FOR EASTERN AFRICA.

Before HAMILTON, C.J. EAST AFRICA; BONHAM CARTER and KING FARLOW, J.J.

WITU RUBBER ESTATES, *Appellants*, orig. *Defendants* *v.* W. J. PEAKE, *Respondent*, orig. *Plaintiff*. COURT OF APPEAL 1/1913 (June, 1913).

Wrongful dismissal of estate manager—Measure of damages—Grounds on which Appellate Court will interfere to reduce damages. —Authority of visiting agents of estate to engage servants for their principal.

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Held:—Damages should be calculated on the basis of the emoluments enjoyed at the time of the wrongful dismissal for such time as might reasonably be expected to elapse before a similar employment could be found.

Held also:—Although the damages awarded by the court of first instance may be in excess of what the Appellate Court would be inclined to award, the Appellate Court will not interfere unless the damages are unreasonable or calculated on wrong grounds.

Held also:—A person dealing *bona fide* with a Company's Agents is not affected with constructive notice as to matters of the internal management of the Company.

A. C. Ross, for Appellant.

R. M. Byron, for Respondent.

The facts appear sufficiently in the judgment of the High Court which follows:—

BARTH, J.—The Plaintiff in this action is seeking to recover from the Defendants Rs.5,100 damages for wrongful dismissal from their service and Rs.237 the balance of salary he alleges to be due to him.

The Plaintiff was offered in April, 1911, a post of Assistant Manager of the Defendants' plantation at Witu, by Messrs. Macdonell Brothers & Smith. He accepted the appointment and arrived at Witu on 19th April, 1911.

Mr. Smith, of the above firm, and Mr. Hilken, a director of the Defendant Company, were at Witu in June, 1911, and the Plaintiff alleges that he was asked by them if he would take over the post of Manager on the departure of Mr. Langdale, who at that time held the position. The Plaintiff accepted, he alleges, on the following terms:—He was to receive pay at the rate of £300 per annum from the 1st July, 1911, and was to be on trial for two months. If satisfactory he was to be employed as Manager on the terms set out in paragraph 4 of the plaint for a term of two years. The verbal arrangements were confirmed by a letter of the 24th June (Exhibit 1) from Messrs. Macdonell Brothers & Smith.

The Plaintiff entered on his duties as Manager on probation and continued his duties as Manager receiving pay at the rate of £300 per annum until 31st May, 1912, at which date his employment was terminated by a letter of the 7th May, 1912 (Exhibit 9), from Messrs. Macdonell Brothers & Smith.

The Defendants case is, primarily, that neither Messrs. Macdonell Brothers & Smith, nor Messrs. Smith & Hilken, had authority to enter into the contract alleged by the Plaintiff.

The Defendants are, I surmise—it has not been proved—a Company registered in England with limited liability. Mr. Smith

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would have me believe that the sole duty of his firm is to visit and report quarterly on the Estate. They have, he says, no Power of Attorney and cannot engage servants for the Company. Now what in fact do Messrs. Macdonell Brothers & Smith do?

They employed the Plaintiff as an assistant manager. They make a verbal agreement with him to become manager which they confirm in writing (Exhibit 1). I do not for a moment believe that there was any mention of a reference to the Board in London for the purposes of confirming that appointment. If there were it seems to me very remarkable that no mention was made of it in Exhibit 1.

The wording of Exhibit 1 is noteworthy; it is "we shall," and is signed by Macdonell Brothers & Smith as visiting agents.

By Exhibit 3 it is obvious that Messrs. Macdonell Brothers & Smith are attempting to engage an assistant to the Plaintiff and take an active part in the management of the Company's accounts, and it is through Messrs. Macdonell Brothers & Smith that Plaintiff receives notice. Messrs. Macdonell Brothers & Smith further give the Plaintiff the fullest instructions (Exhibit B) as to how the plantation should be cultivated and the trees tapped, and these gentlemen occasionally sign themselves "per pro Witu Rubber Estates Ltd."

What is the conclusion that one must draw from this course of business?

It is, in my opinion, that Messrs. Macdonell Brothers & Smith were acting as the agents of the Company, and that engaging servants was not in excess of their authority. It is clear from Exhibit 4, written on the 20th October, 1911, that the Company knew and approved of Mr. Peake's appointment as manager and nothing was done or said to repudiate the appointment until the notice dated 7th May, 1912, which again was sent by Messrs. Macdonell Brothers & Smith. "Satisfactory" in Exhibit 1, I am of the opinion means satisfactory to the Defendants' agents, Messrs. Macdonell Brothers & Smith. I therefore find that Mr. Smith had power to engage the Plaintiff as manager of the Estate and it is conclusive from the work that the Plaintiff did and from the correspondence (*vide* Exhibits 4, 5, 6, 7, 8, 9, 11, 15 and C) that he in fact acted as manager and was regarded as holding such post from 1st September, 1911, to 31st May, 1912.

It is interesting to note that although it is argued that Mr. Hilken could not himself bind the Company by appointing the Plaintiff to the post of manager, yet that gentleman could accept the resignation of the existing manager.

I am of the opinion that the fact that the Defendants did not inform the Plaintiff at the end of the two months' probation but continued his employment is evidence that the Defendants accepted him as manager on the terms of the agreement set out in the Plaint,

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and I am confirmed in this opinion by Exhibit 4 written by the Defendants in London on the 20th October, 1911.

That letter expresses pleasure at the progress made since the Plaintiff took over the management, and its penultimate paragraph shews that the Plaintiff was expected to live in the manager's house, presumably as manager. I regard this letter as a ratification and approval of the contract made by Mr. Smith with the Plaintiff in June, 1911, and which is set out in paragraph 4 of the Plaint.

I daresay that the Plaintiff may have been anxious, and he admits "expecting his papers would come" to get some more definite formal written appointment than Exhibit 1, but in any event I am not prepared to attach too great amount of credence or importance to Mr. Smith's recollection of the alleged conversation about the agreement with the Plaintiff, which conversations the Plaintiff denies.

I am convinced that the Plaintiff was under the belief that he was engaged for two years. It is significant that no answer was sent to Exhibit B, which may or may not have been received by the Plaintiff.

There is no complaint regarding the Plaintiff's work; in fact it is in evidence that his work on the plantation was regarded as satisfactory (*vide* Exhibits 4, 11 and 15).

There remains to be considered the damages to which the Plaintiff is entitled for the breach by the Defendants of the agreement to employ him. The Plaintiff's salary for the first year was £300, and the Plaintiff had completed nine months' service when he left. At this stage I may say that I consider the Plaintiff perfectly justified in leaving on the 31st May after receiving Exhibit 9. Taking into account the comparatively few posts of the kind the Plaintiff occupied there are available in this country at the same or approximately the same salary and the probably long time the Plaintiff will be out of similar employment, I am of the opinion that he is entitled to one year's salary, that is, three months at the rate of £300 per annum and nine months at the rate of £350 per annum, totalling Rs.5,062.50.

There is nothing to controvert the Plaintiff's evidence that the accounts were settled before he left, and Mr. Ross has admitted the sum of Rs.237 claimed as balance of salary due, but seeks to set off Rs.118.90 which in the written statement is alleged to have been received by the Plaintiff through Messrs. Smith, Mackenzie and Coy. and is unaccounted for. No evidence has been offered by the Defendants to prove this, but an entirely different set of facts has been alleged by Mr. Smith. I am of the opinion that the Defendants are bound by their pleadings, and that they are not entitled to set off any sum from the salary admitted due. I

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may say that on the facts alleged by Mr. Smith no case has been made out which would warrant setting off any sum. I therefore find that the Plaintiff is entitled to Rs.237 as salary.

I have refrained from discussing the withholding of a large sum of the Plaintiff's salary by Messrs. Macdonell Brothers & Smith, but I consider the excuse put forward by Mr. Smith as weak and their action unjustifiable.

There will be judgment for the Plaintiff for Rs.5,299·50 and costs.

The Appellants appealed to the Court of Appeal on the question of damages and on the ground that the "visiting agents" had no power to bind the Company.

The Court of Appeal dismissed the appeal in the judgments following :—

HAMILTON, C.J.—In this case I have had the advantage of seeing the judgments of my learned brethren, with which I concur.

I have only to add that the real test of the measure of damages in this case appears to be " What time might reasonably be expected to elapse before the Appellant would in the ordinary course be likely to obtain similar employment to that he lost by his wrongful dismissal ? " Having fixed that period he should be given a sufficient sum to reimburse him for the loss he suffered, calculated on the basis of the emoluments he was enjoying at the time of such loss.

I should have allowed him a sum somewhat less than that which the learned Judge of the Court below thought proper to assess as a jury, but I am not in a position to say that the sum so assessed was, having regard to all the circumstances of the case, calculated on an improper basis, or so much in excess of the sum that we should have felt inclined to allow as to warrant this Court in interfering to reduce it.

The appeal must be dismissed with costs.

BONHAM CARTER, J.—This is an appeal from the judgment of Mr. Justice Barth in Civil Case No. 62 of 1912, in which he awarded Rs.5,299.50 to William James Peake as damages for breach of contract by the Witu Rubber Estates to employ him as Manager.

The Defendants appealed on the ground that the learned Judge erred in holding that the Estates' Agents in this country had power to enter into the contract or in fact did so.

The matter is one of evidence and I am satisfied that the learned Judge had quite sufficient proof that Messrs. Macdonell Brothers & Smith were held out by the Estates as their Agents with

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power to engage a Manager, and that they did so engage William James Peake and that the engagement was for two years.

When the Estates broke their contract Mr. Peake was entitled to recover damages. As regards the amount of damages, when Mr. Peake was dismissed he had fifteen months more to serve, during which he would earn Rs.6,375.00 and also receive certain other advantages. He has been awarded one year's salary. I am of opinion that had I been sitting in the Lower Court I should have considered that six months' salary would have been ample compensation. In my opinion the highest basis to reckon from would be half the unexpired term, or 7½ months. That is, I should, counting the extras, have awarded him something less than Rs.3,500.00.

However, there is a decision *Smith* v. *Thompson* (1) when a two years' agreement was broken with 20 months to run, and a year's emolument was not considered excessive.

With that decision before me and looking at the circumstances of the employment, I cannot see that this Court can interfere. I consider that the appeal should be dismissed.

KING FARLOW, J.—In this case I am substantially in accord with the judgment delivered by Mr. Justice Barth and for the same reasons. It is only upon the question of the amount of damages awarded to the Respondent that I feel some hesitation.

The action is one for wrongful dismissal and is brought against a Company incorporated in England under the Companies Acts, with Estates at Witu. The Respondent entered into a contract to serve them as Manager for a fixed period and was dismissed in breach of such contract. In my opinion the terms of this contract were clear and certain.

It was urged by Counsel for the Appellants that their so-called "Visiting Agents" in East Africa were not authorised to bind them, their principals, by such a contract. Upon the evidence I am entirely against this contention. There is abundant high authority to show that a person who deals *bona fide* with a Company or its directors or agents is not affected with constructive notice of the proceedings of the Company as to matters of "indoor" management of their own concern (to use the words of Lord Hatherley in the case of *Mahony* v. *East Holyford Mining Co.* at p. 894). (2) These "Visiting Agents" acted throughout as though authorised to enter into such contracts on the spot, as the proper management of the Company's Estates demanded.

The contract of service of the Respondent was obviously not of such a character as to be *ultra vires* a plantation Company such as this. On the face of it, it was a most necessary one. Further, there

(1) 18 L.J.N.S. 314. (2) L.R. 7 H.L.

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is ample evidence of ratification by the Appellant Company of their contract with the Respondent, even if their "Visiting Agents" were acting in excess of their apparent authority in entering into it.

As to the amount of damages recoverable for a wrongful dismissal, the ordinary rules as to damages in cases of breach of contract apply. In the words of Chief Justice Coleridge in the Divisional Court Case of *Maw* v. *Jones** "a Plaintiff is entitled to recover for all damage flowing naturally from the breach, and in considering what that would include the jury may take into account the difficulty a Plaintiff would have in given circumstances in obtaining employment elsewhere." Now what has the Respondent lost through the Appellants' breach? He was deprived (*a*) of the opportunity of earning 15 months' salary (three months at the rate of £300 a year, and 12 months at the rate of £350 a year), (*b*) of various other benefits or advantages of appreciable value in the shape of free housing, servants, an annual holiday in the highlands on full pay, an important matter in this country, his travelling expenses to England and back and six months' leave on half-pay at the end of his agreed term of two years' service.

The learned judge in the Court below has assessed the total damages at nearly Rs. 5,300.

Though this amount is substantially in excess of what I should have awarded myself in the case, I see no reason in law why the judgment should be disturbed by this Court. The learned judge has obviously weighed with care the evidence before the Court as to the circumstances in which the Respondent was placed by reason of his wrongful dismissal, and properly lays stress upon the fact that he will find it difficult to get a place similar to that which he held under the Appellants.

There is no suggestion that the Respondent failed to do what was within his power to minimise the damages. He sought to obtain employment elsewhere, and it is in evidence that at the end of five months from his dismissal, when his action was heard, he had not succeeded in obtaining employment.

In all the circumstances this appeal must be dismissed, with costs.

(*Appeal dismissed.*)

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* L.R. 25 Q.B.D. p. 109.

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COURT OF APPEAL FOR EASTERN AFRICA.

Before HAMILTON, C.J. (East Africa), BONHAM-CARTER AND KING FARLOW, J.J.

NOBLE *v.* ATTORNEY-GENERAL EAST AFRICA PROTECTORATE.
Court of Appeal $\frac{4}{1913}$ (June, 1913.)

Suits against the Crown—Specific performance—Indian Limitation Act, Articles 113, 115—Application of Law—Petitions of Right Ordinance, 1910.

Noble sued the Government of the East Africa Protectorate, proceeding under the Petitions of Right Ordinance, 1910, and alleging that by virtue of an agreement entered into by him in 1904 with the then Governor of the Protectorate he was entitled to have a lease granted to him of a certain plot of land and to be put into possession of the same. Alternatively, he asked for the value of the land and an account of the rent and mesne profits.

The Defendant pleaded that the action was barred by the Indian Limitation Act.

The High Court dismissed the action for the reasons set out in the following judgment :—

A. F. Macrae, for Plaintiff.

R. M. Combe, Attorney-General, for the Crown.

BARTH, J.—The learned Attorney-General has raised the issue that the action is barred so far as it refers to a claim for specific performance and for damages for breach of contract by Articles 113 and 115 of the Limitation Act.

The Plaintiff has argued that the law of limitation only applies to subject and subject and cannot be used as a defence by the Crown. In support of that argument *Rustomji* v. *Queen* † has been cited. It has further been contended that the Petitions of Right Ordinance, 1910, in the proviso to Section 8, places the law relating to Petitions of Right on exactly the same footing in all respects as the law in England, including limitation.

It is obvious that the Limitation Act applied to the Protectorate (The Indian Limitation Act (Act XV. of 1877)) specifically provides for the period of limitation within which actions can be brought by

† 1 Q.B.D. 487.

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the Government (*vide* Article 149). It also deals in Article 15 *et seq* with the limitation within which certain specific classes of actions can be brought against the Government. I deduce from this that the provisions of the Act in so far as they refer to other matters are intended and do apply to actions brought against the Government.

The Petitions of Right Ordinance gives the right to subjects to an action against the Government in those cases in which the remedies set out in Section 2 would lie against the Crown in England, and the Procedure to be followed in so far as it is applicable is that laid down by the Code of Civil Procedure. The proviso to Section 8 is necessary because under the Code of Civil Procedure the remedies against the Government are far wider than those given by the Ordinance, and in my opinion the proviso is intended to restrict the application of the Code so that there shall be no question of the wider remedies given by it being applicable in this country and for no other purpose.

I am of opinion that the law of limitation does not apply, and that the action is barred by Articles 113 and 115 of the Limitation Act so far as it relates to specific performance and to damages for breach of contract.

The claim for possession must be based on the alleged lease, and the only way in which possession can now be rightly given is by the performance by the Government of the alleged terms of such lease. In other words, possession can only be given by specific performance of the contract to lease. I have already held that such a claim is barred. I therefore hold that no claim for possession can be brought in the manner sought by the Plaintiff. The action is dismissed with costs.

(*Action dismissed.*)

Against this judgment the Plaintiff appealed to the Court of Appeal.

A. F. Macrae, for Appellant.

Under the Order in Council, 1911, the law to be applied is the English law. The Indian Limitation Act is not an act of universal application.

Further, the Petitions of Right Ordinance in fact applies the English law.

We allege that we were in possession and were dispossessed. Possession is a matter of proof.

Under the Indian Limitation Act, Article 142, we have twelve years from the date of dispossession in which to sue.

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He cited *Rustomji* v. *Queen* (1); *De Bode* v. *King* (2); *Thomas* v. *Queen* (3); *Feather* v. *Queen* (4); *Betts and others* v. *Mahomed Ishmael Chowdry* (5); *Kally Churn Sahoo and others* v. *Secretary of State for India in Council* (6).

R. M. Combe, for Respondent.

In India there is a law of limitation, the Indian Limitation Act, which is applied to the East Africa Protectorate. With reference to the application of Indian Acts, see the Order in Council, 1897.

The Petitions of Right Ordinance is subject to limitations imposed by the applied Indian Act. The suit is, in fact, one for specific performance, and therefore barred by Articles 113, 115 of the Indian Limitation Act.

There never was dispossession. The Appellant can only get possession under the lease for which he asks.

Macrae in reply:—

Under the Indian Civil procedure Code there is a distinction between suits against the Government and against the Secretary of State in Council.

The Court delivered the judgments following:—

HAMILTON, C.J.—This is an appeal from a judgment of Mr. Justice Barth in Civil Case 43 of 1912, of the High Court of East Africa, in the District Registry at Nairobi.

In the original action the Plaintiff asked for a lease to be granted him of a certain plot of land in Nairobi under an agreement made between him and the Government in 1904 and alternatively for damages. The Attorney-General pleaded the Indian Limitation Act in bar of the claim, and the learned Judge held that the action being one for specific performance it was barred by Article 113 of the Act.

On the Plaintiff's own pleadings I am satisfied that this view of the nature of the case was correct. The case is essentially one for specific performance of a contract to grant a lease, and cannot be regarded as a claim for possession, except in so far as the Plaintiff if successful in his claim for a lease would thereby be entitled to enter into possession, or as the learned Judge put it, "the claim for possession must be based on the lease."

(1) 1. Q.B.D. 1875-6, p. 487.
(2) English Reports X. p. 449.
(3) X. Q.B. Cases, p. 31.
(4) English Reports 122 K.B. p. 1191.
(5) XXV. W.R. p. 521.
(6) I. L. R. VI. Cal. p. 726.

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The further question then arises, and it is that which forms the main ground of this appeal, does the Limitation Act apply to suits brought, as was the one in question, under the provisions of the "Petitions of Right Ordinance, 1910"?

It has been contended on behalf of the Appellant that this Ordinance in fact applies the law which is applicable to similar claims in England based on a petition of right, the purpose of which is to do justice notwithstanding any technical objection of law; and that as in pursuance of that principle the Statute of Limitations is not applied in such cases in England, the application of the Indian Limitation Act is impliedly excluded from similar cases in East Africa.

I am unable to accept this view for the following reasons.

The Indian Limitation Act, 1877, as applied to the Protectorate, applies to all proceedings in the Courts of the Protectorate except where otherwise provided, as for instance by Ordinance 2 of 1903 referring to natives.

By Article 11 of the Order in Council, 1897, it is provided that for the purpose of facilitating the application of such Acts:—

> "The Court may construe any such enactment, with such alterations not affecting the substance, as may be necessary or proper to adapt the same to the matter before the Courts."

Now, prior to the passing of the "Petitions of Right Ordinance, 1910" all actions by or against the Government were brought in accordance with the provisions of Chapter 27 of the Civil Procedure Code, and the Limitation Act definitely applied to such actions.

Chapter 27 of the Code, however, by virtue of the provisions of Section 9 of the Petitions of Right Ordinance, no longer applies to such suits, which can now only be brought in accordance with the procedure provided by that Ordinance.

It seems to me therefore that as this suit is of a nature which can be, and it in fact has properly been instituted according to the procedure so provided, it is none the less subject to the law of limitation, which unless otherwise expressly provided applies to all suits brought in the Courts of the Protectorate.

Had this suit been instituted prior to 1910, under Chapter 27 of the C.P.C., it would have been subject to the Indian Limitation Act, and I am therefore of opinion that it is proper to construe that Act as applying to the suit when brought under the procedure provided by the Petitions of Right Ordinance.

Had that Ordinance specifically applied the law existing in England for the institution of suits founded on a petition of right the position might have been different; but in my opinion the Ordinance does no more in this case than provide a procedure

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different from that which would have had to be followed had the Ordinance not been passed, and does not affect the application of the Indian Limitation Act.

For these reasons I think that the judgment of the Lower Court is right and the appeal must be dismissed with costs.

BONHAM-CARTER, J.—The first ground of appeal in this case is that the Indian Limitation Act does not run against the Crown and therefore the Crown cannot plead it. It has been argued that the Petitions of Right Ordinance No. 25 of 1910 has completely abrogated all law heretofore in force in this Protectorate as regards actions against the Government and substituted for this law English Law.

This is not so; the Petitions of Right Ordinance in Section 3 lays down a certain procedure in the bringing of actions against the Government of a nature that can be brought in England.

This is purely an enactment as to procedure and does not in any way alter the substantive law. In Section 8 of the same Ordinance there is a proviso which deprives any person of any remedy given by the Civil Procedure Code in excess of remedies given by English law.

An action for specific performance or for possession of land could in England be preferred against the Government and therefore can be preferred here. The Government has a right to defend under any law that is in force here, and the Indian Limitation Act is applied to claims against the Government. The appeal must fail on the first ground.

The second ground of appeal is that the action being one for possession of land the period of limitation is 12 years under Section 142 of the Limitation Act. The Plaintiff has never alleged actual possession of the land. The opening line of paragraph 4 of his Statement of Claim is not an allegation but an argument. He has not asked for this relief in the Lower Court. He cannot succeed in this Court.

KING FARLOW, J.—The short point in this case is—Does the Indian Limitation Act, 1877, apply to an action in contract brought against the Government of this Protectorate under the Petitions of Right Ordinance, 1910.

The action is in substance one for the specific performance of an agreement whereunder the Appellant alleges the Government, in the year 1904, agreed to grant him a lease of a certain plot of land in Nairobi.

I do not agree with the contention of the Appellant that his claim should be regarded in law as one for recovery of possession. In

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his plaint he prays for an order or declaration that he is beneficially entitled to the ownership and possession of the plot of land in question and that a lease thereof be granted to him as from the date of the alleged agreement and alleged grant or allotment in 1904; alternatively he claims the value of the land and rent and mesne profits as from the said date in 1904. In other words he asks for specific performance.

As to the application of the Indian Limitation Act to this case Section 3 of the Petitions of Right Ordinance provides, and its wording should be carefully noted, as follows:—

> "All claims against the General Government of the Protectorate, being of the same nature as claims which may be preferred against the Crown in England by petition, manifestation or plea of right, may, with the consent of the Governor, be preferred in the High Court in a suit instituted by the Claimant as Plaintiff against the Crown Advocate as Defendant, or such other Officer as the Governor may, from time to time, designate for that purpose."

In effect the Section lays down that when a person prefers a claim against the Government of the Protectorate, which happens to be of the same nature as claims which may be preferred against the Government at home by way of Petition of Right, certain machinery is to be employed. The machinery is described in subsequent sections.

In Section 8 the application of the Indian Civil Procedure Code is expressly preserved, subject, however, to the proviso that this preservation is not to be construed as conferring any greater privileges upon a person proceeding against the Protectorate Government by Petition of Right than a person would have if proceeding by Petition of Right against the Government at home. In other words it would seem that no provision in the Indian Civil Procedure Code could be invoked as giving a remedy to any one against the Government of the Protectorate which he would not be entitled to as against the Crown in England. Furthermore by Section 9 it is specifically provided that Chapter 27 of the Indian Civil Procedure Code ceases to apply to the Protectorate in so far as it relates to suits by or against the Government.

There is no reference in the Ordinance to any Acts, Indian or otherwise, which have been applied to the Protectorate, other than the Indian Civil Procedure Code.

It has been contended by the Appellant that the Indian Limitation Act, 1877, which has been applied to the Protectorate by the Order in Council of 1897, ceases to apply to actions brought against the Protectorate Government, now that the Petitions of Right Ordinance, 1910, has come into force.

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I can find no provision in the Ordinance establishing any such proposition directly or indirectly, or even by implication.

Considering and construing the Ordinance as it stands, without regard to what may or may not have been the intention of the Legislature, I am of opinion that the view of the learned Judge in the Court below is the correct one. I hold that the Indian Limitation Act, 1877, applies, and that this suit, brought by the Appellant against the Government, is barred thereby.

The appeal is dismissed with costs.

(*Appeal dismissed.*)

ORIGINAL CIVIL.

Before HAMILTON, C.J.

ALIDINA VISRAM *v.* NOORMAHOMED AND ROWJI O.C. 26/1913

(July, 1913.)

Civil Procedure Code, § 17—Place of suing—And § 20 stay of proceedings where Defendants do not reside within the jurisdiction—Contract made abroad to be performed in Mombasa.

The Plaintiff, residing at Mombasa, entered into a contract with the Defendants, residing at Lourenço Marques, for the sale and shipment to them of certain produce. The Plaintiff's offer was accepted at Lourenço Marques by the Defendants, the Plaintiff being thereby bound to ship the produce at Mombasa. The produce was so shipped by the Plaintiff, but the Defendants refused to accept it, whereupon the Plaintiff re-sold it at their risk and account. The re-sale resulted in a loss, to recoup himself for which the Plaintiff filed this action.

The Defendants then applied under § 20 of the Civil Procedure Code that all proceedings in the suit be stayed.

Held:—The suit could be brought at Lourenço Marques, where the contract was made, or at Mombasa, where it was to be performed, and it not being shown that justice was more likely to be done by the suit being instituted in the former place the Plaintiff had the right to proceed at Mombasa.

A. C. Ross, for Defendants, in support of the application.

The proviso to Section 17 of the Civil Procedure Code covers the whole clause. We reside and carry on business at Lourenço Marques,

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where the contract was to be completed by delivery of the goods. The contract was a foreign contract and is governed by Portuguese law.

The payment here would have been in ordinary course by bill payable in Lourenço Marques. If payment were to be made otherwise the onus is on Plaintiff to show it.

Proceedings should therefore be stayed here and the Plaintiff should sue in Lourenço Marques. He referred to Chitty on Contracts, p. 117, and to *Llewhellin* v. *Chuni Lall.* (1)

G. G. Atkinson, for Plaintiff.

We are suing for damages and therefore Explanation III. subsection iii. to Section 17 of the Civil Procedure Code does not apply.

The Contract was completed at Mombasa on shipment of the goods and we are therefore entitled to sue there.

He referred to the Indian Contract Act, Section 91, and to the White Book, 1913, p. 90.

Ross, in reply :—

According to the pleadings the goods were not accepted, and if the goods were delivered the Plaintiff cannot sue for damages.

If the contract was to be performed in Mombasa the Plaintiff can only sue for the price of the goods.

HAMILTON, C.J.—This is an application under Section 20 of the Civil Procedure Code on the part of the Defendants to the action to stay proceedings.

The Section in question relates to the stay of proceedings in a suit which may be instituted in more than one Court.

The suit is one arising out of contract, and Mr. Ross in support of the application has argued that the suit cannot be brought in this Court and can only be brought in Lourenço Marques where the contract was made, where it was to be performed, and where money under the contract was impliedly payable.

Were this contention correct it would be a good defence to the action brought here but would not be a reason for an Order for stay of proceedings under Section 20.

The facts as pleaded by the Plaintiff are that he, living and trading in Mombasa, offered to sell and Defendants, living and trading in Lourenço Marques, agreed to accept certain grain to be shipped from Mombasa to Lourenço Marques, that the grain was so shipped but that the Defendants refused to accept it and the grain was re-sold at Defendants' risk, such re-sale resulting in a loss.

(1) I.L.R. iv. All. p. 423.

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ALIDINA VISRAM v. NOORMAHOMED AND ROWJI. O.C. 26/1913

The Plaintiff is now suing to recover that loss, together with freight and incidental charges. On these facts it is clear that the Defendants' acceptance was given at Lourenço Marques and the contract was consequently made there and the action could be brought there.

It is also clear that under Section 91 of the Contract Act delivery to the Steamship Company having been made in Mombasa that delivery had the same effect as delivery to the buyer and the contract was therefore performed in Mombasa, and that being so the action can under sub-section ii to Explanation III to Section 17 of the Civil Procedure Code be brought in Mombasa, the place of performance.

I am unable to accept the argument that Plaintiff cannot plead non-acceptance by the Defendants in Lourenço Marques and at the same time rely on delivery to the Steamship Company in Mombasa. The Plaintiff still retained a lien on the goods and his right to exercise it arose when the Defendants refused to accept them.

Sub-section iii to Explanation III of Section 17 Civil Procedure Code does not appear to apply to the circumstances of this case, as here the money to which the suit relates is by way of damages and not money payable under the contract.

I am therefore of opinion that the suit could be brought here, the place of performance, or in Lourenço Marques, the place where the contract was made.

It has not been made to appear to me that "justice is more likely to be done" by the suit being instituted in Lourenço Marques, and I therefore dismiss the application with costs.

(*Application dismissed.*)

CRIMINAL CONFIRMATION.

Before HAMILTON, C. J., AND BONHAM CARTER, J.

REX *v.* PETER AND JIM. Cr.C. 283/1913 (August, 1913).

Courts Ordinance, 1907, Section 33—Jurisdiction of Magistrates over natives—"Cape-boy" a native.

Held:—For the purposes of jurisdiction under the Courts Ordinance a "Cape-boy" is a native.

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The Town Magistrate, Eldoret, having sentenced the two accused to three years' rigorous imprisonment each on a charge of housebreaking, doubted his jurisdiction to deal with them as natives as they were "Cape-boys."

The High Court consequently heard the Attorney-General on the question of the magistrate's jurisdiction and gave the following joint judgment :—

In this case two Cape-boys were sentenced by the Town Magistrate at Eldoret to terms of three' years imprisonment each for housebreaking under Section 457, I.P.C.

As the learned Magistrate was in some doubt as to the extent of his jurisdiction over Cape-boys, which is ordinarily limited to the power of passing a sentence of two years' imprisonment, but which in the case of natives extends with certain exceptions, which do not affect charges under Section 457 of the I.P.C., to the passing of any legal sentence, the Court requested the Attorney-General to argue in support of the conviction.

After hearing the learned Attorney-General we are satisfied that a Cape-boy is a "native" for the purposes of the Courts Ordinance, 1907.

This Ordinance does not define "native," but inasmuch as it is a consolidating Ordinance, repealing other Ordinances and Regulations dealing with the jurisdiction of Courts with regard to Natives and other persons and constitutes fresh Courts for like purposes and defines their jurisdictions it is necessary to look at the law as it was at the time of the passing of this Ordinance.

There being no fresh definition of "native" in the Courts Ordinance, 1907, it must be assumed that there was no intention to alter the existing definition of "native" in the repealed Regulations dealing with the jurisdiction of Courts over natives.

This definition is contained in Section 1 of the Native Courts Regulations, which was repealed by the Courts Ordinance, 1907.

Sub-section (*a*) of Section 1 defines "native" as a "native of Africa not of European or American origin." A Cape-boy by birth is a native of Africa and though he may have a strain of white blood more or less remote, we do not consider that this is sufficient reason for holding him to be of European origin. He is *prima facie* a native for the purposes of the Courts Ordinance and the onus of proving a European origin rests upon him.

We are therefore of opinion that the sentences passed in this case were not beyond the jurisdiction of the Magistrate and we confirm them.

(*Sentences confirmed.*)

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ORIGINAL CIVIL.

Before HAMILTON, C.J.

HALIMABHAI *v.* ABDARAHIM HAJI ISMAIL MITHU O.C. $\frac{81}{1912}$
ADMINISTRATOR ESTATE OF HAJI ISMAIL MITHU (September, 1913.)

Memons of Mombasa—Law governing intestate succession—Hindus converted to Mahomedanism—Retention of Hindu customs—Variation of custom—Evidence of variation—Onus of proof—Costs not ordered out of estate—Security for costs on appeal.

The Plaintiff, the widow of Haji Ismail Mithu, deceased, sued the administrator of the estate of her late husband to recover a one-eighth share of the estate, which she alleged was due to her as her right as a sharer by the Mahomedan law governing the distribution of intestate estates. The administrator refused to admit the claim on the ground that the distribution of intestate estates among Memons was governed by Hindu custom under which males take to the exclusion of females, who are entitled only to be maintained out of the estate.

† *Held*:—Memons being originally Hindus who were subsequently converted to Mahomedanism and in fact retained the Hindu custom of inheritance in Cutch, the onus of proof is on the person alleging a variation of that custom in favour of the Mahomedan law among the Memons settled in East Africa.

Held also:—That costs in such a case should not be ordered out of the estate.

Held also:—Where security for costs is given on appeal, the words "any costs that may be ordered by the Court of Appeal to be paid by the Appellant," in Rule 6 of the Rules of H.M. Court of Appeal for Eastern Africa, includes costs in the original suit from which the appeal is preferred.

A. C. Ross, for Plaintiff.

The Memons are Mahomedans to whom *prima facie* Mahomedan law applies. See Seyid Amir Ali Mahomedan Law, Vol. II., p. 137. Granting that they originally retained the Hindu custom of inheritance, I have to prove the discontinuance of that custom in favour of the Mahomedan law among the Memons of Mombasa. The evidence is in my favour, that produced by the Defendant as to

† The Judgment of the High Court was subsequently reversed by the Court of Appeal for Eastern Africa. The report of these proceedings will appear in Vol. V., part 2.

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the continuance of Hindu custom is vague. There is no case proved in which the Jemat has distributed an estate by Hindu custom. The Court records are in my favour. He referred to *Mahomed Sidick* v. *Haji Ahmed and others* (1), *Rahimatbai* v. *Hirbai* (2), *Lachman Rai* v. *Akbar Khan* (3), *Lala* v. *Hira Singh* (4), and *in the matter of the will of Haji Ismail Haji Abdulla* (5).

C. M. Dalal for Defendant, R. M. Byron with him.

Dalal:—The Plaintiff is here setting up a custom in Mombasa which is not the custom of inheritance among Memons in Cutch, and the onus is on her to prove this custom, which must be proved in accordance with the Evidence Act.

The Court records of the Administration files have in themselves no value as evidence.

Byron.—A Memon carries his personal law with him though he has changed his domicile. The law applicable to Memons has been long since decided. The Plaintiff is endeavouring to set up a variation of that law on very slight grounds. He referred to *Jugmohandass Mangaldas* v. *Sir Mangaldas Nathubhoy* (6), *Patel Vandravan Jekisan* v. *Patel Manilal Chunilal* (7), *Rama Nand* v. *Surgiani* (8), *Soorendronath Roy* v. *Mussamut Heeramonee Burmoneah* (9), and *Ramalakshmi Ammal* v. *Sivanantha Perumal Sethurayer* (10).

HAMILTON, C.J.—In this suit the Plaintiff, a widow, is suing the Administrator of the Estate of her deceased husband, and prays for a declaration that she is entitled to an eighth share in her husband's estate.

The deceased was a Scindhi Nassapooria Memon domiciled in Mombasa, and the Plaintiff is also a member of the same caste.

The Memons derive their origin from Scinde and belonged to a sect of Hindus known as Luwanas. They became converted to the Mahomedan faith some four or five hundred years ago, and about three hundred or three hundred and fifty years ago began to migrate to Cutch, where they settled and remained.

The migration to Cutch was in successive waves, and the members and descendants of the first migration were called "Cutchee" Memons to distinguish them from the members of the second migration, who were called "Nassapoorias" after the name of their native place in Scinde.

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(1) I.L.R. X. Bomb. p. 1.
(2) I.L.R. III. Bomb. p. 34.
(3) I.L.R. I. All. p. 410.
(4) I.L.R. II. All. p. 49.
(5) I.L.R. VI. Bomb. 452.
(6) I.L.R. X. Bomb. at p. 541.
(7) I.L.R. XVI. Bomb. at p. 476.
(8) I.L.R. XVI. All. 221.
(9) Moore I. A. XII. 81.
(10) Moore I. A. XIV. at p. 585.

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There are also various other sub-divisions of the sect now domiciled in Cutch, of which the principal are the Gamrai or "villagers" and the Bhujai, to which it is not necessary to refer further here.

The religious tenets and customs of the Cutchee and Nassapooria sub-divisions of the Memons in Cutch do not appear to show, and it has been admitted that there are not any differences between them beyond the fact (which has not been explained in the course of this case) that they do not intermarry.

At the commencement of the case the term "Cutchee" and its precise signification led to some little confusion, but it became clear from the evidence as the case developed that, in addition to its meaning as defining a sub-division of the community, it also has been and is used with a geographical signification only as indicating the home and place of settlement of the Memon community generally.

On the pleadings a number of issues were at first framed to cover the questions raised of a variation of custom in succession to intestate estates between Nassapoorias and Cutchees, and as the Defendant, a member of a Mohamedan community, pleaded that the case was governed by the Hindu law of succession, under which males take to the exclusion of females, the onus was placed on him of proving the custom which he propounded.

After he had led a considerable amount of evidence in support of his case the Plaintiff admitted that there was no difference in Cutch between the customs of Cutchees and Nassapoorias in the matter of succession, and fell back on his main lines, viz., that there had been a discontinuance among the Memons in Mombasa of the customs of the community which obtained in Cutch, and that in Mombasa they had adopted and followed the custom of regulating intestate succession by the rules of Mohamedan law.

The onus of proof was thereby shifted back to the Plaintiff, and the only issue which remained for consideration was "Is the Plaintiff by the custom of Memons in Mombasa entitled to share in the estate of her late husband according to the rules of Mohamedan law?" Or, in other words, the Plaintiff had to prove the existence among the Memons of Mombasa of a custom of following the Mohamedan law of intestate succession in distinction from and to the exclusion of the Hindu law of succession as followed by the community in Cutch.

Now, the Memons of Mombasa belong almost entirely to the Nassapooria sub-division. They apparently began to migrate to this part of Africa about fifty years ago and during the last fifty years they have continued to arrive from Cutch, so that at the present time there are according to the evidence only about a dozen families still resident in their old place of settlement, and the decision therefore in this case will affect almost the whole Nassapooria sub-division community.

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It has been argued by Mr. Ross on behalf of the Plaintiff that having regard to the fact that the Memons are primarily Mohamedans, they would, when transplanted from their old surroundings to what is essentially a Mohamedan country, be peculiarly susceptible to the Mohamedan influence of their new surroundings, which would be likely to cause them to pay greater heed to the real law of their faith, and that therefore the Plaintiff has not so much to discharge the onus of proving a new custom as of proving the discontinuance of the Hindu custom, which does not accord with the teaching of the faith to which they belong.

With this argument I can only agree to a limited extent, namely, that the surrounding influences of Mohamedanism are likely to induce, and on the evidence it is clear that they in fact have induced, certain members of the community to desire a closer communion in all respects with the law of Islam and to mould their actions accordingly. But while this no doubt throws light on much of the evidence in the case, we have to face the fact that so long as nearly seventy years ago it was authoritatively laid down by the Supreme Court of Bombay that Cutchee Memons were governed by the Hindu law of succession, and since that date there have been many cases decided to the same effect, and that if the Nassapooria Memons of Mombasa are to be bound now by the Mohamedan law on the subject, it must be proved not only that they have discontinued to observe the old custom which was affirmed as the existing custom by Sir J. Erskine Perry in 1847, but they have since their arrival in Mombasa adopted a custom not previously followed by them as a community or as a sub-division of the Memon community in Cutch.

And before this Court could hold that the onus of such proof had been satisfactorily discharged it would require to be able to hold that all the elements that are necessary for the proof not only of a new custom but of a change of custom are established before it clearly and are beyond the possibility of doubt or question.

To quote from the judgment of the Privy Council in the case of Ramalakshmi Ammal *v.* Sivanantha Perumal Sethurayer (1) :—

> "It is of the essence of special usages, modifying the ordinary law of succession, that they should be ancient and invariable; and it is further essential that they should be established to be so by clear and unambiguous evidence."

As to the proof by which custom may be established, Turner, J., in the case of *Lachman Rai* v. *Akbar Khan* (2) said with truth :— "The most cogent evidence of custom is not that which is afforded by the expression of opinion as to its existence, but the examination

(1) Supra.
(2) Supra.

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of instances in which the alleged custom has been acted upon, and by the proof afforded by judicial or revenue records or private records or receipts that the custom has been enforced."

Now, applying this test to the evidence given in this case, a great deal of it is mere expression of opinion, and of opinion influenced by the leading members of the community, who have frankly expressed themselves in favour of the Mohamedan law. The two leading members of the community themselves, Haji Mahomed and Haji Kassim, both wish to see the Mohamedan custom established; but while Haji Mahomed said, "I have come to Court in this case as I want to see Mohamedan custom established," and stoutly maintained that all Memon estates were distributed by Mohamedan law in Mombasa, his evidence as to concrete instances was very largely broken down in cross-examination, much appearing to be mere hearsay influenced by his desire to see the Mohamedan custom established.

Haji Kassim, on the other hand, though he expressed the opinion that "the better custom is to follow one's own faith, *i.e.*, the Mohamedan law," carefully refrained from allowing his own views to influence his evidence when he said:—"There is not a uniform practice of inheritance among the community in Mombasa. The majority have followed our old custom, some, the minority, the Mohamedan law."

This very fairly sums up the clear impression left on my mind by the evidence as to the true state of the facts.

And in this respect I would refer to one fact which has been fairly established by the evidence and which is of importance as indicating the continuance of the Hindu custom, viz., that even in cases where administration by Mohamedan law was alleged, it seems to have been the universal custom for the widow's ornaments to be returned to the family of the late husband.

Great reliance was placed by the Plaintiff on the Court Administration files, which have been made exhibits in the case. These are files in which the Court keeps the records of applications for administration or probate, and on which are placed the accounts filed by an executor or administrator.

Of these there are in all seven which refer to intestate estates prior to the date of this case, the earliest being of the year 1901.

Of these seven one was insolvent and one that of a minor. There remain, therefore, five instances in which the administrator filed an account showing a distribution of the estate according to Mohamedan law. In one of these five the administrator was the sole heir, and the share of his mother referred to was kept in the business of the deceased.

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We have, therefore, four clear cases since 1901 in which the administrators, acting on their own inclination, or in accordance with what they believed to be the law, or under the influence of others filed accounts showing a distribution effected by Mohamedan law. In none of these cases was any question raised or decided as to the law by which such estates should have been distributed.

Giving to these instances the highest evidentiary value to which they are entitled they do not go further than to show that within the last 12 years there have been a few cases in which the administrators have purported to distribute estates by Mohamedan law. To support these concrete instances there is oral evidence as to others, which partakes of hearsay, is vague and generally unreliable.

To sum up the whole evidence produced by the Plaintiff in support of her case, she has, in my opinion, failed to prove that the Mohamedan custom, which she alleges exists in Mombasa, is ancient or that it is invariable and the evidence produced is, to my mind, neither clear nor unambiguous. She has not satisfactorily discharged the onus upon her, and I find, therefore, that the Plaintiff is not entitled to share in her late husband's estate according to Mohamedan law, the said estate being subject to the Hindu law of succession.

After hearing argument as to costs the Court made the following order :—

In this case I have been in some doubt as to the proper order to make regarding the costs, but, after consideration, I am not satisfied that sufficient grounds exist for departing from the ordinary rule that costs should follow the event. This case is not that of an Administrator coming to the Court for directions as to how an estate should be administered, or of an executor seeking to interpret a will, but the Plaintiff deliberately sued to recover a share in the estate of the deceased to which it was alleged she was entitled by custom contrary to that of the community to which she belonged. Without alleging that she had no grounds on which to base her claim it is sufficient that she failed to establish it for me to hold that the Defendant, who has been put to heavy expense to defend his lawful rights, is entitled to his costs, which he has refrained from asking for on the higher scale or for two counsel.

The case on the main issue, therefore, stands dismissed with costs.

(*Case dismissed.*)

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HALIMABHAI v. ABDARAHIM HAJI ISMAIL MITHU. O.C. 81 1913

On the Plaintiff subsequently filing an appeal to the Court of Appeal for Eastern Africa, the Defendant applied for an order against her for security for the decretal amount.

The Court made the order following:—

This is an application to the High Court under Rule 6 of Rules issued by H.M. Court of Appeal for Eastern Africa dated January 13th, 1910, for the Appellant to be ordered to give such security as will cover the amount of the costs which she has been ordered to pay in the High Court.

Under the C.P.C., Section 549, a discretion is allowed to the Appellate Court as to ordering security for the costs of the Appeal or of the original suit or both. Under Rule 6 of the Court of Appeal Rules there is no such discretion left to the High Court; the directions are imperative, and in the event of security not being given as ordered proceedings are automatically stayed unless the High Court or the Court of Appeal shall otherwise order.

It has been argued that the words "any costs that may be ordered by the Court of Appeal to be paid by the Appellant" do not include costs in the original suit from which the appeal is preferred. I think, however, that this contention is not good, for the costs of the original suit may have to be paid by the Appellant by order of the Court of Appeal; they, therefore, clearly fall within the scope and meaning of the words already quoted.

The facts here are that the Appellant is a woman without means of her own, but who brought the original suit and is now prosecuting the appeal with funds supplied by her friends and relations. The taxed costs in the High Court amount to Rs.1,361.25. The Court fees on the Appeal have been paid and security has been given in Rs.1,000/- for the costs of making up the record, for costs generally and for prosecuting the appeal, a sum obviously insufficient to cover the costs in the High Court in addition to the other matters for which security has been given. After consulting with the Ag.-Registrar I am satisfied that security for an additional Rs.1,000/- will be sufficient and I, therefore, order security to be given within 10 days for a total sum of Rs.2,000/-.

In conclusion I would only add that were I not bound, as I consider myself to be bound by Rule 6, I am of opinion that the case is one where in the exercise of discretion security for the costs in the original suit should properly be ordered.

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CRIMINAL REVISION.

Before HAMILTON, C.J., and BONHAM CARTER, J.

REX *v.* LUBUI KUNGU and 19 OTHERS. Cr.R. $\frac{23}{1913}$ (October, 1913).

Native Passes Regulations No. 12 of 1900—Rules thereunder dated 30th November, 1903—Penalties Ordinance 13 of 1903—Natives crossing the boundary of the district in which they are resident must be provided with passes—Criminal Procedure Code, Section 239, joinder of persons in one trial.

Held:—It is not an offence under the Native Passes Regulations for a Kikuyu to be in the Ulu District without a pass, the offence contemplated by the Regulations is that of a native crossing the boundary of the district of which he is a resident into another district without a pass.

Held also:—A joinder in one trial of a number of persons charged with the commission of similar but separate offences on different dates is bad.

The District Commissioner Machakos charged and tried at one trial twenty Wakikuyu with being in Ulu without permits. He convicted them and sentenced them to 14 days rigorous imprisonment each and ordered them to be returned to Kikuyu. The papers were sent by the High Court to the Attorney-General who was heard on revision.

R. M. Combe, Attorney-General:—

The regulations apply to natives when remaining in a district—not only to travelling natives.

On a native being found outside his district the onus is on him to show he had a pass to leave his district. The words "resident in any district" mean whose ordinary place of residence is in that district.

Persons have been misjoinded, but that is a technicality of procedure. I admit the Magistrate had no power to order the return of the accused.

The Court, after taking time to consider, delivered the following judgments:—

HAMILTON, C.J.—In this case twenty Wakikuyu were charged at one trial by the District Commissioner Machakos with "being in Ulu without permits" and convicted under Rules 1 and 2 of 1903 made by the Governor under the Native Pass Regulations, 1900, and were all sentenced under the Penalties Ordinance 13 of 1903 to 14 days' rigorous imprisonment and to be returned to Kikuyu.

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REX v. LUBUI KUNGU and 19 others. CR. R. 23/1913

Now, the Regulations under which the Rules are made give power to the Governor to make rules "to control the movements of natives travelling within the limits of the Protectorate," and Rule 1 of the Rules referred to provides that "any native resident in any district within the Protectorate" other than certain excepted persons, "crossing the boundary of such district into any other district within the Protectorate shall be required to be provided with a pass."

It thus appears that, though the crossing a boundary without a pass is made a punishable offence, inasmuch as a breach of the Rules is punishable under the Penalties Ordinance, the accused in this case were charged with "being in Ulu without permits" and convicted on their own pleas, no evidence whatever being called.

The Magistrate, in his judgment, found as follows:—

> "These people are all Kikuyu. Apparently most of them did not return on their passes. Some have been living here a year."

He therefore, in effect, found that the majority of the accused had come into Ulu with passes, and therefore had committed no offence, and he proceeded to convict them because they had not gone back.

The cases have not been considered separately as to whether each individual crossed the boundary without a pass, but all the accused have been convicted *en bloc* of "being in Ulu without a pass."

In my opinion the law cannot be so applied, and the procedure of trying different individuals at one trial for different offences committed by them at different times and places is more than an irregularity which can be cured either by the Criminal Procedure Code or Article 20 of the Order in Council, 1902. For example, here those who admitted coming into Ulu without passes and those who pleaded that they had passes have all alike been convicted, though the Magistrate believed that many of them had come in with passes.

The prejudice suffered by these people is unmistakable and it is to avoid such prejudice that the law directs that persons charged with separate offences shall be tried separately.

It is, however, clear that what the Magistrate had in his mind was that any Kikuyu charged in Ulu with being there without a permit was liable to conviction if he could not produce a pass, and therefore, no doubt he did not consider that it was to the prejudice of the accused that they should be tried together.

But that is not in my opinion the law, which is strictly confined to natives travelling without a pass from their district of residence to another district. Travelling within or remaining within

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the district in which he is resident without a pass does not render a native liable to be punished; he can only be punished if being a resident of a district he has crossed the boundary of that district without a pass.

The meaning of the word "resident" is therefore at once in issue. It is a vague term and difficult of any general interpretation, for though it might be held that a Kikuyu living and working in the Ulu district for years or months was resident there, it could hardly be said that a Kikuyu who came in on business or pleasure occupying only a short time had become a resident of Ulu.

The learned Attorney-General was at first prepared to contend that resident meant "in his district of birth and up-bringing" but eventually could not place it higher than "ordinary place of residence." I do not myself think that any general interpretation would be satisfactory, but each case would have to be considered on its merits. But I am satisfied that "resident" does not mean, as the Magistrate appears to have thought it meant, resident in the place of birth of the Accused. Were that so nearly every native working away from his home in East Africa would be liable to be put in prison at the will of anyone who put the law in motion against him, a state of affairs obviously not contemplated by the law which requires only that a native when travelling shall if he crosses the boundary of the district in which he is resident be provided with a pass.

The order for the return of the accused made by the Magistrate is not within his powers.

For the reasons given above, the convictions and sentences of the accused must be reversed.

BONHAM CARTER, J.—I agree with the remarks of the Chief Justice. It also appears that the District Commissioner has tried twelve cases of the same nature in August, these cases included 141 persons. It may be assumed that most of these cases have the same defects as the two we have revised. The former months show one or two similar cases at the most. It appears to me that the District Commissioner has turned the penal law into a weapon of oppression.

> "Judges must beware of hard constructions and strained inferences; for there is no worse torture than the torture of laws:—especially of laws penal, they ought to have care that that which was meant for terror be not turned into rigour; . . . for penal laws pressed are a shower of snares upon the people; therefore let penal laws, if they have been sleepers of long . . . be by wise Judges confined in the execution."†

† Bacon's Essay on Judication.

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REX v. LUBUI KUNGU and 19 others. CR. R. 23/1913

It appears to me that the Magistrate has used hard constructions and strained inferences, turned the penal law into rigour and suddenly awakened a penal law that, even if it applied, had been allowed to sleep.

(*Sentences reversed.*)

ORIGINAL CIVIL.

Before HAMILTON, C.J.

HUMPHREYS *v.* MOYNAGH O. C. 41/1913 N. R. B. (October, 1913).

Indian Contract Act, Section 222—Indemnity of agent against consequences of lawful acts.

Held:—An agent who make a reasonable settlement of a claim made on account of loss suffered owing to his principal's default is entitled to be indemnfied by his principal.

M—— as agent for H—— contracted in Nairobi with a London firm to supply them with five tons of coffee by a certain date, H—— undertaking to supply the five tons of coffee to M—— for shipment and sale on the footing of the above contract. H—— failed to supply the coffee. M—— consequently was unable to fulfil his contract with the London firm, who in consequence suffered a loss of £50. 8s. 4d., which they deducted from monies of M—— in their hands. M—— after enquiry agreed to this sum as reasonable, and claimed to be entitled to reimbursement by H——. At the trial it was not shown that the settlement was unreasonable.

B. G. Allen, for Plaintiff.

Defendant should have sued for damages for non-delivery in time in Nairobi, and the London firm should have sued Plaintiff.

E. K. Figgis, for Defendant.

The London firm looked only to the Defendant, and the Plaintiff knew he had to supply in time for the sale in London.

HAMILTON, C.J.—The Plaintiff in this case is a farmer and the Defendant carries on the business of an estate agent and broker. During the Plaintiff's absence from Nairobi in 1912 his farm was managed for him by a Mr. Aubrey. On the 16th August Aubrey employed Defendant to dispose in London of some coffee from Plaintiff's farm, and agreed to supply five tons for September delivery, shipment on completion of delivery. Aubrey, I am satisfied on the evidence, agreed to Defendant selling it forward *C.I.F.*, the Plaintiff to get the full price at which it was sold less charges and Defendant's commission at 7½%. In pursuance of this agreement three small deliveries of coffee were made in August and early in September to Defendant, but this coffee having got wet on its way in from the farm, Aubrey, on Defendant's advice, agreed to its being sold locally;

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it was so sold and fetched Rs.839.08. Aubrey in fact failed to supply the five tons agreed in time for Defendant to implement his contract with the London buyer, and as the London buyer had sold the coffee forward to a French firm, the London buyer had to indemnify them at a sum agreed, at 1,030 francs. The London buyer, therefore, deducted from monies of Defendant in his hands this sum, together with his expenses, making in all a sum of £50. 8s. 4d. The Defendant consequently retained the sum of Rs.839.08 he had received for Plaintiff's coffee sold locally and claims that he is entitled to receive in all from Plaintiff the sum of Rs.848.16 made up of the said £50. 8s. 4d., Rs.50 for his costs and expenses and Rs.41.91 his commission on the coffee sold locally. It has been argued on behalf of the Plaintiff that the contract between Aubrey and Defendant was carried out by defendant in respect of the first three deliveries, but I am satisfied on the evidence that the agreement to sell these locally was mutual, and was not regarded as varying the original contract to supply the five tons for September delivery which still hold good. It has also been argued that the action is misconceived and that Defendant should have sued for damages for non-delivery in time, in Nairobi. As regards this, it is clear that Defendant was Plaintiff's agent for the sale of the coffee, but that in relation to the London buyer he was acting as agent for an undisclosed principal. The London buyer therefore had the right to sue Defendant, and Defendant had the right to be indemnified by the Plaintiff, his principal, against the consequences of lawful acts done by him in the exercise of the authority conferred upon him. The real issue, therefore, is whether Defendant was acting lawfully and within the scope of his authority in settling with the London buyer for £50 8s. 4d. And as the London buyer could have sued him, the only question is whether he made the best settlement he could to make good the damage caused by his principal's breach. On this point it is clear the Defendant at first thought the claim was extravagant, but that on ascertaining the fluctuations of the market prices at the date when the contract should have been completed, he was satisfied as to the justness of the demand—on this point, as throughout, the Defendant gave his evidence very fairly and the Plaintiff has failed to show either by cross-examination of Defendant or by direct evidence that the settlement made by the Defendant was for an improper sum, I therefore find that Defendant is entitled to be reimbursed this sum by the Plaintiff, and I also find that his other charges for costs and commission are proper and payable by Plaintiff.

I give judgment for Defendant for the sum claimed on his counter-claim with costs.

(*Judgment for Defendant on claim and counter-claim.*)

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APPELLATE CIVIL.

Before HAMILTON, C.J.

GAMBLE, *Appellant*, orig. *Defendant v.* ALIKHAN, s/o DOWLAT, *Respondent*, orig. *Plaintiff*. C.A. $\frac{33}{1913}$ (November, 1913).

Bailment—Horse dying when in hands of hirer—Want of care on part of hirer—Proof of negligence.

Held:—For the owner to succeed in an action for damages for the loss of his horse hired out he must satisfy the Court that the loss was due to the hirer's negligence.

A. F. McCrae, for Appellant.

E. K. Figgis, for Respondent.

The facts appear sufficiently from the judgment of the High Court :—

HAMILTON, C.J.—This is an appeal from a judgment of the Town Magistrate, Nairobi, in Civil Case No. 17 of 1913, of that Court.

The action originally brought by the Plaintiff (Respondent) was for the recovery of certain sums for rickshaw, mule and horse hire and the value of a horse which the defendant hired and failed to return. The learned Magistrate found for the plaintiff for the value of the horse and it is against this part of his judgment that the Defendant has appealed.

The facts are that at a time when horse sickness was prevalent in the country, the appellant hired from the Respondent a horse for a safari to Embu. On reaching Embu he sent back the horse to Nairobi in charge of a servant who was not accustomed to the care of horses. No special instructions were given to the servant, who apparently led it back by ordinary easy stages, but the horse died before reaching Nairobi, showing symptoms of horse sickness. On these facts the learned Magistrate held as follows :—

> "Whether or not the horse died of horse sickness it does not appear that the Defendant took as much care of the horse as a man of ordinary prudence would take of his own. I think therefore that he must pay for it.

It has been argued in this Court that there was no proof of negligence on the part of the Defendant, while, on the other hand, it is contended on behalf of the Respondent that the facts themselves prove the Defendant's negligence, in that he sent back the horse in charge of a boy unacquainted with the management of horses without special instructions when horse sickness was prevalent.

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As to this I agree with the learned Magistrate's finding that "the Defendant did not take as much care of the horse as a man of ordinary prudence would take of his own."

But before the person who hired out the horse can recover its value he must prove not that the hirer was negligent, but that the death of the horse was the result of such negligence. The foundation of his action is loss caused by the hirer's negligence. It is not sufficient to say alone that because the horse was not returned in charge of a sais with special instructions that the Defendant is liable for its death, and the Court cannot thereupon be asked to infer that the death of the horse was caused by the Defendant's want of care. The Plaintiff should have been required to prove this in the first instance, in which event he would, in view of the Defendant's want of care, have been entitled to succeed. The Plaintiff, in fact, hired out the horse when horse sickness was prevalent, the horse apparently died of that disease, being possibly infected when hired, and Plaintiff has failed to prove that the disease of which the horse died was caused by the Defendant's negligence.

For these reasons I am of opinion that the Appellant must succeed.

I allow the appeal with costs of this Court and two thirds of the costs in the Court below and direct that the decree be varied accordingly. *(Appeal allowed.)*

A second appeal was subsequently filed to the Court of Appeal for Eastern Africa, and dismissed by that Court on the ground that the Appellant had failed to convince the Court "that there was reasonable probability from the facts of the case that the death of the horse was due to the negligence of the Respondent."

ORIGINAL CIVIL.

Before HAMILTON, C.J.

GROGAN *v.* CROSS. O.C. $\frac{39}{1913}$ N.R.B. (November, 1913).

Indian Transfer of Property Act, Section 9—Transfer of property when not required by law to be in writing—Surrender of lease for valuable consideration.

Held:—A lease can be surrendered for valuable consideration without a formal reconveyance in writing.

C—— held land under leases from G——, the leases containing a covenant for the payment of increasing rent. Being unable to develop the land and anxious to avoid his covenant for rent C—— handed his leases to G——'s agent and thereafter ceased to pay

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GROGAN v. CROSS O.C. 39 1913

rent. G—— subsequently wished to sell her property and found that her agent had not taken a formal surrender in writing from C—— and consequently asked C—— for a formal surrender. C—— thereupon denied that he had surrendered the leases, and tendered the rent in arrear. G——then sued C—— praying for a declaration that the leases had been duly surrendered.

B. G. Allen, for Plaintiff:—

The leases were in fact surrendered for valuable consideration, viz., the avoidance of the obligation to pay an increasing rent.

There was a mutual agreement to that effect, which is not required by law to be in writing; therefore, under Section 9, Transfer of Property Act, the surrender was complete when the leases were handed over.

He referred to *Grimman* v. *Legge* (1) *and Imambandi Begum* v. *Kamleswari Pershad* (2).

E. K. Figgis, for Defendant.

There was no mutual agreement and no express surrender for which the English law requires writing and great definiteness. He referred to the Statute of Frauds and the Indian Contract Act, Section 25. As there was no consideration given for the surrender in this case a writing was necessary.

HAMILTON, C.J.—In this case the Plaintiff, a married woman, is suing the Defendant for a declaration that certain leases of land in Nairobi granted by her to the Defendant have been duly surrendered and for an order for the execution by him of formal surrenders.

It appears that early in the present year the Plaintiff being desirous of benefiting by the high values for land then ruling in Nairobi decided to auction certain properties of hers, including the land comprised in the leases in question, which her agent believed had been surrendered by the Defendant in August or September, 1907. In going into the matter, however, in preparation for the intended sale, her solicitor, Mr. Allen, discovered that there were no formal surrenders of the leases amongst the documents relating to the land. The Defendant was, therefore, applied to, but he refused to sign any document of surrender, denying that he had in fact surrendered the leases and tendering all arrears of rent.

The events in question happened six years ago, and it so happens that at that time or shortly afterwards both Mr. Fichat, who was then acting for the Plaintiff, and the Defendant, became seriously ill and unable to attend to business for considerable periods. This no doubt has tended to make the memory of both them regarding the transactions in reference to the leases more uncertain than even the lapse of time would in the ordinary course of nature have been likely to render them.

(1) 8 B. and C. 324. (2) I.L.R. XIV Cal. 109.

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The Defendant's story, however, is on the face of it improbable, and the sudden brightening of his recollection on seeing the receipt (Exhibit 10) was singularly unconvincing, particularly when it is borne in mind that his story of how he gave his documents to Fichat, the Plaintiff's agent, to keep, is contrary to the ordinary course of business. On the other hand Fichat's suggestion that these documents were subsequently destroyed by rats when removed from his office to his house does not afford a very satisfactory explanation for their non-production.

Be that as it may, the fact remains that Defendant did hand his leases over to the Plaintiff's agent, and when the evidence of Allen and Fichat is read, together with the examination of Defendant, in which certain vital points were carefully avoided, I have no hesitation in coming to the conclusion that Defendant did in fact mutually agree with Fichat to surrender the leases in question in consideration of his being let off his covenant to pay rent, and that in pursuance of this agreement he delivered up his documents to Fichat.

I have, therefore, only to consider whether in law this operated as a complete surrender.

Under English law a writing would have been necessary, but we are here governed by the provisions of the Indian Transfer of Property Act as applied to the Protectorate.

Section 9 of that Act provides that :—

> "A transfer of property may be made without writing in every case in which a writing is not expressly required by law."

Does the law then require than an express surrender of a lease should be in writing.

Mr. Figgis has referred to Section 25 of the Contract Act, but that deals only with agreements made without consideration. Here there was consideration for the surrender, the lessee was unable to do anything with the land and surrendered it for the consideration of being let off his covenant to pay rent which was to be at an increasing ratio.

There is very little case law on the point, but the case quoted in support of Shepherd & Brown's Commentary on Section 111 of the Act to the effect that no particular words or formalities are required to make a good surrender, bears out what would appear to be the fact that there is no express requirement of law that such a surrender as this should be in writing. That is the case of *Imambandi Begum* v. *Kumleswari Pershad* (1), decided by the Privy Council in 1886. It was there held that where a lease had been relinquished for valuable consideration a formal reconveyance was not necessary.

I am, therefore, of opinion that the Plaintiff is entitled to succeed and that the action is not barred by limitation as suggested by Mr. Figgis.

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There will be a decree that the leases in question were surrendered by mutual agreement on the date on which Cross handed the documents to Fichat. The Defendant must pay the costs of the action.

Judgment for Plaintiff.

ORIGINAL CRIMINAL.

Before HAMILTON, C.J.

REX *v.* KAROGA WA KITHENGI AND 53 OTHERS. O.CR. 88/1913

(November 1913)

Culpable homicide—Indian Penal Code, Section 300, exception 3—Native Council recognized by the Governor acting in excess of its powers.

A recognized Native Council, or Kiama, in Kikuyu country tried, sentenced, and executed certain persons who were suspected of being witch doctors. The sentence was death by burning, which was carried out by the members of the Kiama compelling the relatives of the deceased to set fire to a hut in which the condemned men had been placed.

It was proved at the trial that the members of the Kiama had not been instructed as to the limits of their jurisdiction under the Native Tribunal Rules, 1911, †, that they acted on the advice of their chief, and believed in so doing that they were justified in exercising their ancient customary jurisdiction to sentence witch doctors to death.

Held :—That the members of the council acted in good faith in excess of their powers as public servants and the offence fell within exception 3 to Section 300 I.P.C. and was not murder but culpable homicide not amounting to murder.

H. A. Young, Assistant Attorney and General for Crown.

The facts proved constitute murder.

There is a wide difference between a fine of 250 Rs. under Rule 4, or six months' imprisonment subject to confirmation under Rule 6, and a sentence of death by burning. The council must have known they had not powers of life and death.

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† Rule 4, Native Tribunal Rules, 1911. "A council shall have jurisdiction . . . . . in petty criminal matters on complaint by natives relating to offences against native law and customs to award punishment according to native law and custom. Provided that no such punishment shall involve mutilation, torture or grievous hurt, or shall be repugnant to humanity or morality. And provided that no compensation awarded or fine imposed shall exceed the value of 250 rupees."

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E. K. Figgis for the Defence.

The powers of the Kiama were never taken away; they have been recognized by the Government of late years and limited. The council as a judicial body were "public servants" as defined by the Code, and that they acted in good faith is shown by their referring to their chief for his advice. The evidence shows that they had not been instructed as to the limits of their jurisdiction as recognized by the Governor.

Adopting another point of view the council acted as a jury finding on the facts, and the sentence was really passed by the chief and thereafter executed by the council. In any event the offence was not murder.

HAMILTON, C.J.—The facts of this case are somewhat peculiar. In August of this year there was much sickness and death in the Kikuyu country owing to plague, cerebro-spinal meningitis and pneumonia. As a consequence the Kikuyu, who are much given to the practice of witch doctoring, not unnaturally suspected that their ills were due to the powers for evil of the witch doctors, and in the location of Chief Gathecha two men, Gunga and Katche, were denounced as being the cause of 16 deaths. The Kiama, or Native Council of Elders, was called together to try the men and on the first day of the sitting Gathecha presided. He, however, was called away on other business and his place as president taken by Kinanjui. The council found the men guilty, and on the second day sent Kinanjui to Gathecha for his advice as to what they should do with them. Gathecha sent back a message to the effect that they could burn them if they liked. Directly this message was received the men were in fact burnt in a hut in the presence of the Kiama and with their direct approval.

The actual lighting of the hut was done by a relative of the men who were to be burnt, who, with his hands tied behind his back and a torch thrust into them, was compelled with blows and threats to apply it to the hut.

This device was apparently adopted with the object of preventing the relatives of the dead men laying any complaint or claim for compensation at a future date.

While this proceeding was going on another relative of the men in the hut was kept tied in the centre of the assembly with a cloak over his head so that he could not see what was going on. Both these men, Kamau and Warui, were originally committed for trial together with the members of the Kiama on a charge of murder.

I, however, directed that they should be tendered a conditional pardon and they have been called as witnesses in the case together with the chief, Gathecha.

The evidence of Kamau and Warui might naturally be suspect owing to the fact that Kamau carried out the Kiama's orders and that both he and Warui would be hostile to the accused. But the

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REX v. KAROGA and 53 others. O.CR. 88/1913

accused make no attempt to deny the facts with the exception of Kinanjui, who was said to have placed the torch in Kamau's hands when they were tied behind his back; this he denies, saying that Kamau was not bound and that he took the torch by the general order of the Kiama. On this point I believe Kamau, who graphically described the whole proceeding, and I have no reason whatever to believe that the main facts are otherwise than as stated.

The Kiama acted according to native custom in trying and burning men accused of causing deaths by magic, and do not consider that they have done anything but a meritorious act. But the action of Gathecha, which is not in issue here except in so far as it relates to the reliability of his evidence, is subject to different considerations from those affecting the rest of the Kiama.

Mr. Issac, the D.C., has given evidence to the effect that since the beginning of this year it has been the practice for the Kiama to sit at the station for the hearing of all serious matters, and Gathecha, when pressed by the Court, refused to say why in this instance he summoned the Kiama for the location instead of the station.

Now, it is in evidence that Gathecha had been expressly told the Kiama had not powers of life and death, but there is no evidence that these instructions had been given to the individual members of the Kiama; and from the evidence throughout it is clear that Gathecha had great weight with the Kiama and that they looked to him for advice, would not act without it, and would not have acted contrary to it. That Gathecha knew he was acting contrary to orders is fairly obvious from the evidence of Mr. Issac and his own evidence in cross-examination. He, the prime mover in the whole matter, acted contrary to explicit instructions and advised the Kiama to do that, which he knew to be wrong, and then, in order to cover his tracks, made a false and misleading report of the facts to the District Commissioner. It is fairly obvious, too, from his cross-examination, that he endeavoured in his evidence, as far as he could, to exculpate himself and place the full culpability for the decision as far as he could on the Kiama.

I will now deal *seriatim* with the arguments that have been put forward by Mr. Figgis for the defence.

In the first place, it has been argued that the Kiama, who could by their own law and custom act as they did, were, in fact, merely exercising powers which were inherent, and which had never been taken from them by treaty. This contention cannot, I think, be upheld; the Crown, whether by treaty, grant, usage or otherwise, has assumed and does in fact exercise within the Protectorate the right to legislate for the inhabitants of the Protectorate. In the exercise of that right the Government has passed the Courts Ordinance

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of 1907, establishing Courts with varying jurisdictions subordinate to the High Court. In that Ordinance, Section 10, it is provided that the Governor may recognize the jurisdiction of native councils or grant them jurisdiction and that jurisdiction so granted shall be exercised in accordance with Rules framed by him. The Native Tribunal Rules, 1913, passed for the purpose, provide that such councils only as have been recognized by the Governor shall exercise jurisdiction and that that jurisdiction shall be exercised in accordance with the Rules.

The criminal jurisdiction of the councils recognized is limited to six months' imprisonment and does not extend to powers of life and death. I am, therefore, of the opinion that the council who are accused in this case acted in excess of their jurisdiction in sentencing the men to be burnt. In the next place, it was argued that the council were in fact in the position of jurymen finding on the facts, and that the sentence of death was Gathecha's and his alone.

While allowing that the procedure of native councils is somewhat indefinite, this argument is not borne out by the evidence on the record, which is to the effect that the Kiama actually passed the sentence and had it carried out in their presence. They may, it is true, have acted on Gathecha's advice, but I am satisfied that the action was their own.

I now have to consider whether this action is covered by exception 3 to Section 300 of the Indian Penal Code, that is to say, whether the council sitting as a judicial body acted in good faith in what they did. The evidence on this point is that they relied entirely on Gathecha, their chief's, advice, and that there was no talk of burning till Gathecha's message was received. This, in conjunction with the fact that there is no evidence as to their being instructed that, as a recognized council by the Governor, they were no longer exercising their old customary jurisdiction, but only such jurisdiction as the Governor's rules allowed them to exercise, leads to me to believe that they did act in good faith, and I agree with the Assessors in the opinion that they were misled by Gathecha.

I, therefore, find accused guilty of the offence of abetment of culpable homicide, not amounting to murder, and as they instigated the burning and were present at the commission of the offence they are guilty of the principal offence under Section 304 of the Indian Penal Code.

I sentence them each to one day's imprisonment, and to pay a fine of Rs.50, and direct that out of the total fine the customary compensation to be assessed by the District Commissioner be paid to the relatives of the men who were burnt.

(*Accused convicted.*)

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APPELLATE CIVIL.

Before BONHAM-CARTER, J.

ABDULLAH BIN SHEIKH BIN YUNUS ON BEHALF OF THE THALATHA THAIFA AND W. N. MACMILLAN

v.

(1) THE WAKF COMMISSIONERS; (2) THE LAND OFFICER ON BEHALF OF H.M. GOVERNMENT OF EAST AFRICA. C.A. $\frac{12}{1913}$

(October 14, 15, 16, 17.)
(November 4, 5, 7, 10, 12, 13, 14.)
(December 23.)

The Island of Mombasa—Tribal ownership of lands—Rights and Customs as evidence of territorial ownership.

Held:—That the evidence produced by the plaintiff established no right to the land claimed.

A. Morrison, for Appellants.

O. Daly, for Respondents.

This was an appeal from the decision of the Recorder of Titles refusing a title to the Sheikh of the Three Tribes to some 200 acres on Island of Mombasa.

A mass of evidence was taken by the Recorder and the argument was entirely on the admissibility and value of that evidence.

The arguments and facts are sufficiently set out in the judgment which was delivered on December 23rd:—

BONHAM CARTER, J.—This is an appeal from a judgment of the Recorder of Titles. Abdullah bin Sheikh bin Yunus claimed as Sheikh of the Thalatha Thaifa or Three Tribes some two hundred acres more or less in the south-west corner of the Island of Mombasa and W. N. MacMillan claimed under Abdulla's title a portion of this land. These claims were disallowed.

TOPOGRAPHY.

Mombasa Island lies surrounded by narrow harbours and is some 3½ miles from north to south, and 2 miles from east to west. It has been estimated to contain about 3,000 acres. The older portions of the present native town of Mombasa lie on the east of the Island on the Harbour of Mombasa, about 1,600 yards to the north of the mouth of the Harbour. On the south of the old portions of the town of Mombasa is the big Portuguese Fort, Fort Jesus, erected at the end of the 16th century. About 1,000 yards to the south is the ruin of a Fort and Chapel at Ras Serani at the mouth of Mombasa Harbour. Seven hundred yards to

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the south-west of this is the ruin of another Fort and Chapel at Ras Kabrasi overlooking the outer entrance to Kilindini Harbour. Eight hundred yards further at Ras Mzimli at the narrow entrance to Kilindini Harbour is another small Horse-shoe Fort and one thousand yards further on to the north-west is a larger Round Fort fairly in Kilindini Harbour. The sea front of the claim of Abdullah bin Sheikh is from 50 to 100 yards to the north-east of the Horse-shoe Fort to 50 to 100 yards to the north-west of the Round Fort. Between the two forts and occupying most of the frontage and going in from the shore some 300 to 400 yards is the ruin of a very considerable and well built town with a wall around it. The north-east portion of this town is hard to define as the bush there is very dense, on the west side the wall and numerous buildings are clear. I have had the place referred to as Mnara Mkubwa cleared for the purposes of this case. Four hundred yards to the north of the Round Fort and over-looking Mbaraki Creek is a Mnara or light-house-like tower, and adjacent to it are several ruins. Another 400 yards to the north is a cemetery referred to as the Sheriffu Cemetery, and 800 yards further to the north the ruins of a Mosque. On the portion from Fort Jesus to the mouth of Mombasa Harbour there are certainly two wells and possibly others. Stress has been laid upon the Two Minara and on the song saying that the Two Towers are our marks. This song is supposed to be some forty years old and the Towers are pointed out as the present Mnara standing on Mbaraki Creek and called Mnara Mdogo (or Little Tower), and the other called Mnara Mkubwa (or Big Tower) is pointed out as a ruin some 600 yards to the west of the Horse-shoe Fort and inside the ruined city. There is considerable amount of very excellent masonry there and what to my mind might certainly be the base of a Mnara. I have a map of Mombasa Island dated 1635. It is archaic and nothing is drawn to scale but there are certain salient points. Fort Jesus is accurately drawn but exaggerated, there is a Chapel but no Fort at Ras Serani; a cross but no buildings at Ras Kabrasi, no buildings at Ras Mzimli. A walled enclosure where the ruined town is, an enclosure with houses at the head of Mbaraki Creek, a Chapel at Kilindini Point another at Shimanzi—three forts at Makupa and two groups of villages on Mombasa Harbour. The Island is planted with trees, not cocoanuts, probable mango. There are cocoanuts on the mainland at Likoni and Mkomani and Mtongwe, the rest of the mainland is bush. I gather from this map that at that date the batteries at Ras Serani, Ras Kabrasi, Ras Mzimli and Kilindini Harbour had not been built and that there was an uninhabited (no houses shown) walled enclosure where the ruined town is with a village to the north of it and that the two groups of villages on Mombasa Harbour are respectively those of the Three and the

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Nine Tribes. The Mnara Mdogo had not been built, there is no trace of the Mnara Mkubwa, I consider that it had already fallen.

There is another map in 1728 when the Portuguese, assisted by the King of Patta, captured Mombasa for the last time. I consider that I am entitled to use this map, authenticated as it is by Herr Justus Strandes himself. The four Forts of Serani, Kabrasi, Mzimli and in the Kilindini Harbour have now been built, there are two villages on Kilindini Harbour, one described as that of Muskat to the south and one described as that of Kilindini to the north where Kilindini Point now is. The two villages or towns again appear at Mombasa, the southern-most of which occupies the site of the southern villages shown in the plan of 1635, the northern at Mzizima or Mji wa Kale. The Mnara Mdogo is clearly shown, but no traces of the ruined town. I think that these two plans show that the Mnara Mdogo was built between 1636 and 1738 A.D. I consider that the village marked on the 1635 A.D. Map north of the ruined town was the village of which the ruins are near the Mnara Mdogo and which is claimed by the Sheriffu as their town. The people of Muskat were I presume the garrison of the forts.

The next map is the chart of Captain Owen, of H.M.S. "Tudor," 1824. Fort Jesus is marked, and another new Fort slightly south of it (I can find no traces of this, it has probably been built over), two buildings at Ras Serani, the Forts of Kabrasi, Mzimli and Kilindini Harbour, the Mnara Mdogo and "Kilbindeeny" now at the head of Luatoni Creek. There are no traces of the ruined town, and the clear deduction is that it must have been invisible owing to being covered by bush. The country appears from sea to be all bush. The town of Mombasa is divided into two, the southern being the more important. "The town is divided into parts, one inhabited by the Arabs, and the other by the Sowhylese." That is, I presume the Mazuri and the tribes. The road runs from Mombasa to Luatoni and the mouth of Mbaraki Creek. This same chart corrected in 1879 and 1882 shows only one road from Mombasa to the head of Mbaraki Creek and shows "former village of Kilindini" a trifle to the north of Luatoni. It shows cultivation in the centre of the Island and also cocoanuts near the Mnara Mdogo and at Likoni and other places, none however on the ground at present under claim.

My deductions from these maps and charts and the writings that I have is that the walled town was destroyed and abandoned prior to 1635 A.D. and has never been re-inhabited. There has been a vast amount of evidence as to the amount of cultivation of the land under dispute, I find that it has been sparsely cultivated in patches at varying intervals, at times almost entirely deserted and at others a considerable amount under cultivation. There has not been any permanent cultivation either on the land now claimed or the

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land directly to the east of it for very many years, there is no trace of mango or cocoanut on these lands. A great portion of the land is very bare coral and practically non-productive.

The land, however, has now become very valuable for building sites for European residences and has been valued by the Recorder at £100 per acre.

HISTORY.

Many centuries ago Mombasa was apparently colonised by certain tribes of Asiatic origin who became friendly with the native tribes and lived on the Island. These tribes divided into two corporations, one group, more probably the elder, being called the Thalatha Thaifa or Three Tribes, and the other the Tissia Thaifa or Nine Tribes. Both these federations had friendly relations with the natives and exercised rule over certain territories outside the Island. The Three Tribes were the Tangana, Kilindini and Changamwe. I do not attempt to give the names of the Nine Tribes, but a number of them have names from places further up the coast such as Kilifi, Faza, Pate. The names of the Three Tribes appear to be local. The accepted dividing line between the two confederations is the Kusi—Makupa Road, the Nine Tribes being to the north-east and the Three Tribes to the south-west of this road. This condition of affairs may have existed when the Portuguese arrived. In 1505 A.D. the Portuguese stormed and sacked Mombasa, and from thence to 1729 A.D. there was a constant taking and retaking of Mombasa by the Portuguese, their opponents being Turks, Zimbas, the Sultan of Mombasa (from Malindi) and the Imam of Oman. The main rule was with the Portuguese, who were, however, finally driven out in 1726 by the Arabs of Muskat. After this there was a Governor named Saleh bin Mohamed, who oppressed the Kilindini so much that they abandoned the Island. This man was deposed. In 1739 A.D. the then Imam appointed Mohamed bin Athman, a member of the powerful Arab or Persian Mazrui family or clan, Governor of Mombasa. In 1741 A.D. Mohamed bin Athman threw off his allegiance to Oman and began to rule as an independent chieftain. This was resented by the Sultan, who sent seven "Captains" to Mombasa who killed Mohamed bin Athman. Ali bin Athman his brother escaped and took refuge with the Three Tribes. With their assistance he recaptured the Fort. It is alleged that at that time Ali expressed great friendliness to the Three Tribes. From 1739 to 1837 the Mazrui ruled in Mombasa, though constantly fighting with the Sultans. In or about 1822 A.D. the Mazrui sought the protection of Captain Vidal of H.M.S. "Barracouta" against the Sultan, and the British flag was hoisted, but the Protectorate was repudiated by the British Government and abandoned. In 1837 the inhabitants got impatient of the

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Mazrui rule and a deputation of the tribes, including Mwalimu bin Mwishafi, the Mzee of Kilindini, went to Muscat to Seyid Said, who came to Mombasa and by force or fraud completely broke the Mazrui power in Mombasa. In this year the then town of Kilindini was destroyed.

The Sultans of Zanzibar ruled over Mombasa from then onwards. In 1887 a Concession was granted to the British East Africa Association, which was reconstituted in the following year as the Imperial British East Africa Company. In 1895 the Mazrui of Mambrui and Gazi rebelled against the British rule. The rebellion was suppressed and the Company ceded their agreement, which was reissued to the British Government.

CLAIM.

Abdullah bin Sheikh bin Yunus has been recognised by the Government as the Sheikh of the Three Tribes and comes from a family whose members for several generations have provided the Sheikhs of the Three Tribes. Abdullah bin Sheikh is of the Tangana Tribe.

The land is claimed as the remnant of the tribal land of the Three Tribes.

The original claim was for land bounded on the east by Government, north by railway line, west by land sold by Said Hassan, south by sea-shore.

On further development of the case it is alleged that the eastern boundary is an old one with the Mazrui and the western boundary is land of the Sheriffu. There were no pleadings and no issues in the trial before the learned Recorder, and it is most difficult to arrive at issues from the vast amount of evidence I have before me.

The main points of evidence which the Claimant relies on to prove both his title and possession are :—1, certain documents; 2, occupation by frequenting the Mzimli; 3, occupation by grant of fishing stakes; 4, occupation by permission of cultivation; 5, title by the songs; 6, title by allowing occupation by Mohamed bin Abdullah.

The allegation of the Claimant is that the whole of the Island belonged to the Three Tribes and Nine Tribes but all portions except the part claimed have been alienated. He states members of the Thalatha Thaifa can acquire land by cutting the bush and planting cocoanut trees and permanent crops. If these crops grow to maturity the land becomes the property of the cultivator and he can sell the same without the permission of the rest of the tribe or Sheikh.

Taisiri bin Aziz gives evidence as to the methods of cultivating.

"If we cultivated and left the shamba after harvesting for one year it would become covered with big bush. People like us when

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cultivating after clearing the bush dig out the roots and set fire to them. After planting Matama, after five months we could begin the harvest. For the second year we could still cultivate in the shamba. In the third year if the soil is not good we could go elsewhere. Five years is the longest time we could cultivate a shamba without going elsewhere."

The Claimant alleges that cultivators pay him Rs.2 to cultivate.

There are several statements as to the power of different persons to sell tribal land, but as far as I can gather from the file there has been no evidence of any weight given of any sale of tribal land except possibly that of Bushiri bin Hemed to Salim bin Khalfan.

DOCUMENTS.

The Arabic documents in the case have proved very difficult to decipher. With the assistance of Mr. O. F. Watkins I believe that I have got to as satisfactory a conclusion as is possible, and his translations have been accepted by both sides.

The documents are twelve in number and I take them in order of date.

1. Exhibit (1) dated 1252 A.H. (1836—1837 A.D.) is from Said bin Sultan and appoints Sheikh Msherazi "Arbiter" among his people, and declaring that the Liwali, the representative of the Sultan, had not power over his people.

I assume that the people referred to are the Three Tribes, though it does not clearly appear to be so. This document is dated very shortly after the capture of Mombasa by Said bin Sultan and gives authority to the local man over his local tribes.

2. Exhibit (F) dated 1254 A.H. (1838—1839 A.D.) From Said bin Sultan and appoints Mohamed bin Shahali Sheikh of the Changamwe and Arbiter of disputes.
3. Exhibit (11) dated 1256 A.H. (1840—1841 A.D.) From Suliman bin Hamed confirms the appointment of Sheikh Msherazi; over which there appears to have been some trouble.
4. Exhibit (2) dated 1266 A.H. (1860 A.D.) is a proclamation again confirming Sheikh Msherazi.
5. Exhibit (G) dated 1275 A.H. (1857 or 1858 A.D.) from Majid bin Said bin Sultan appoints Mohamed bin Shahali Sheikh and Arbiter of the Changamwe.
6. Exhibit (5) 1276 A.H. (1860—1861 A.D.) Majid bin Said appoints Mohamed bin Yunus Sheikh in place of his father Sheikh Yunus.
7. Exhibit (12) 1279 A.H. (1862 A.D.) From Majid bin Said to Liwali telling him to respect the rights of Mohamed bin Yunus and his people of Kilindini.

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8. Exhibit (8) 1282 A.H. (1865 A.D.) From Majid bin Said "let no man hinder Sheikh Hamis bin Kombo in their district of our town of Mombasa and its environs for this district is "theirs" from old "time."

"Theirs" is by the Appellant alleged to be the Nine "Tribes."

9. Exhibit (9) 1282 A.H. (1865 A.D.) a grant of fishing rights from Mkanyageni to the "Fort which belonged to the Mazrui" by Suliman bin Hamed.

10. Exhibit (3) 1287 A.H (1870 A.D.) Said Bargash appoints Mwenye Matano Sheikh of the Kilindini.

11. Exhibit (13) 1305 A.H. (1887–1888 A.D.) Khalifa bin Said to Liwali Salim bin Khalfan, conserves the rights of the Sheikhs of the Arabs and the Nine Tribes and the Three Tribes as granted by documents.

12. Exhibit (10) undated, about 1253—1258 A.H. probably—Kalid bin Said informs Liwali Ali bin Nasor that Sheikh Msherazi is Sheikh of the Three Tribes.

Documents 1, 11, 2, 5, 12, 10 are concerned with appointments and confirmation of appointments of Sheikhs of the Three Tribes.

Documents F and G appoint Sheikhs over the Changamwe.

Document 3 appoints a Sheikh of the Kilindini.

Document 8 it is contended conserved the rights of the Nine Tribes.

Document 13 confirms all rights of Arabs and Nine Tribes and Three Tribes on the accession of Kalifa bin Said.

Document 9 is of no importance. It had a certain value when mistranslated.

It is clear from these documents that the Sultans did acknowledge the Three Tribes and Nine Tribes and appointed Sheikhs over them with certain powers, but I can find nothing in any of the documents which would lead me to believe that the Sultans acknowledged the Tribes' right to any land.

MZIMLI.

The next ground is the matter of the Mzimli. A "Mzimu" is a spirit and "Mzimli" is a local locative. This particular Mzimli is on the shore of Kilindini harbour about 200 yards to the west of the Horse-shoe Fort. The Mzimu appears to be a pagan survival, and among the stricter Mohamedans it is considered a not very reputable one. The practice is apparently that when a person desires anything—a cure, or a male child for example—he goes to Mzimli and makes a vow and registers it in some way. Should the spirits be propitious and his object obtained, he makes payment. The payment is in some cases made by deposit at the Mzimli, in other cases by payment to a charity. The charity selected being generally one

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very close home, *e.g.*, a tutor or a brother-in-law. If the payment is made at the Mzimli it is secured by any one who is not afraid of the spirit—three special persons claim it for themselves—others give evidence that any Tangana can take it, others that any members of the Three Tribes. The evidence on the Mzimli is unsatisfactory and contradictory. There are some thirteen witnesses who give evidence about it, of which five say they have been there; two say that no educated people go; three say people go but they themselves do not; and the three Claimants to the Mzimli tell varying and wholly incredible stories. To lay claim to a landed title on such claims and such evidence is very little short of the ridiculous. Each witness has his own theory, and the Mzimli might equally belong to the Three Tribes or to the Tangana or the particular family who have apparently usurped it and who appear to be a peculiarly undesirable set of medicine men. I cannot see how any claim can be based on the Mzimli. No ingenuity can stretch the visiting of a shrine as possession of land.

FISHING STAKES.

Mzee Mohamed bin Matano says that he gives permission to erect fishing stakes, but does not appear to have given very many or very regularly. His evidence is that the last payment he got for permission to erect stakes was from Baba wa Mwenye Umbu, and this is two years ago. Another man paid him two rupees—it appears that some people believe Mzee Mohamed bin Matano can give permission all over the Island, some that he can give it from Makupa to Ras Mzimli, and others only from Ras Mzimli to Mbaraki Creek. There was no doubt some regulation and fees for the fishing rights before this Government came, and it was most probably vested in the Authorities of the Arab and Tribal Communities and a relic of it survives to this day, but only a relic.

This does not appear to me to have any connection with ownership of land, but merely a regulation to prevent the overcrowding of fishing stakes by the local authorities.

PERMISSION.

As regards permission to cultivate on this land, Sheikh Abdullah bin Sheikh says that he has given permission for people to cultivate on this land. Sheikh Abdullah bin Sheikh says that he has given permission for people to cultivate and names two, Abedi, who had permission from Sheikh Mohamed bin Yunus, and Aziz, whose land does not appear to be on the land claimed and who does not point it out. Sheikh Abdullah bin Juma, Kilindini, not a Mzee, states he gave permission for three or four to cultivate. Another Kilindini, not a Mzee, states he gave permission to one man to cultivate. Seven witnesses allege that they have been given permission, four of whom cannot or

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will not point out the land. The Government produces nine witnesses who have cultivated the land, varying from a very considerable period to two years, in this area and have not received any permission or been interfered with by any one save the Government. The evidence of the giving permission on the land claimed is very weak and untrustworthy, and even if true would not in my opinion give any title to the land resembling a freehold nature to the tribes.

MOHAMED BIN ABDULLAH.

There is the story of Mohamed bin Abdullah cultivating a garden inside the walls of the ruined town about 40 years ago and paying the then Sheikh of the Tangana, Mohamed bin Yunus, $30 for permission to do so. The evidence on this matter is unsatisfactory. I have very little doubt that Mohamed bin Abdullah did make a shamba in the ruins of the ruined town and that at one time he paid $30 to some or other of the Three Tribes. The evidence is not satisfactory and the payment seems excessive according to the custom. There is a probability of the payment being in connection with the guards at the Ferries. There is a song which is alleged to support the story—

Iko Minara Mirefu
Iliyo Wakwa Kadimu
Wakikaa Waongofu
Miji Mitatu Timaam
Na Mtu Akiwashufu
Naye Akamba Naam
Musifanye Usaumu
Ndani Kwenu Shihiri.

The words are not capable of being translated into sense, the best that I can obtain at all literally is—

These tall towers
Which were built in ancient days
And inhabited by an upright folk
Three complete towns.
If a man sees them he will speak with respect.
Do not make trouble.
Go home back you Arab scum.

I have had a free version supplied me—

Tall minarets of ancient time
Do form the subject of my rhyme.
Three towns there are hard by their place
The dwelling of an upright race.
When an invader sees their walls
He flies with most respectful squalls
Hence to your homes, here make no strife,
Go save your Mshihire life.

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Whatever the meaning of these words are, there is practically nothing to connect them with Mohamed bin Abdullah or his shamba, and they prove nothing whatever. I cannot find anything of any value in the story of the shamba of Mohamed bin Abdullah, the story is far too nebulous.

SONGS.

There are two other songs that the Claimant also relies on :—

Mwanzo wa Kilindini twatema mwitu
Minara miwili ni alama yetu
Sheikh Mohamadi tupe chapa yetu

In the beginning at Kilindini we cleared the bush.
Two towers are our marks.
Sheikh Mohamed give us our seal.

Shajara lina Wazee
Wanalizuia
Na kwamba nalo ningelitoa
Kulla Mwenye chakwe akikitambua

Your pedigree is kept back by Wazee.
If I had it I would have given it to you.
Then every man would know his own.

These are supposed to relate to a dispute between the Tangana and the Sheriffu about the offerings at the Minara, and are produced as evidence that the Tangana owned land between Two Minara ; this is supposed to be about forty years ago. I cannot find anything in this as evidencing title to land.

" Two towers are our boundaries " as of ancient custom seems to me to be quite meaningless if applied to the Mnara Mdogo and the alleged Mnara Mkubwa. I am satisfied that if the Mnara Mkubwa ever existed it had fallen before the Mnara Mdogo had been built, so that these two towers could not be referred to as " Two Tall Towers." Moreover, as to these Towers being Three Tribe Marks, the Mnara Mdogo is not a Three Tribe Tower but a Sheriffu Tower and stands on land not even claimed by the Three Tribes. While also the Three Tribes allege that the whole of the island south-west of the Makupa Kuse Road was theirs, these two towers are in the very south-west corner of the island, so that it would be absurd to call them their boundaries.

SALE OF LAND TO LIWALI SALIM BIN KHALFAN.

In 1896 Salim bin Khalfan bought three plots of ground to the north of the land in dispute, he bought

One from Mohamed bin Matano Kilindini.
One from Sherif Ahmed bin Alowi Sheriffu.

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One from Salim bin Babu El Mtafi, who is of the Nine Tribes, his mother being of the Three Tribes.

All these documents are witnessed by Mohamed bin Yunus, Sheikh of the Three Tribes, and Hasan bin Hasan, a Mzee of Kilindini. It is argued from this that the sale was by the Three Tribes, but I can find nothing to support this. These lands were alleged to be cultivated and have signs of permanent cultivation on them, and under the law as alleged by the Claimants could be sold without intervention of elders at all. These sales were sales of private land privately owned.

GENERAL.

I turn to the action of the three Vendors to Messrs. Falcao, Morrison and Home.

The conveyances are by Sheikh Abdullah bin Sheikh, Mohamed bin Matano and Thabit bin Muktar as elders of the Watangana and on behalf of the Watangana. Sheikh Abdullah is the admitted Sheikh of the Tangana, but Mohamed bin Matano is a Mzee of the Kilindini, and Thabit bin Muktar is a Bajun or Nyale of the Nine Tribes. His mother was a Tangana and sister of Sheikh Mahomed bin Yunus. Thabit is therefore a cousin of Sheikh Abdullah. Sheikh Abdullah states that descent in the Three Tribes follows only by males, and when asked about Thabit bin Muktar signing the document becomes terribly involved and after first saying that Thabit signed as a member of the Three Tribes he then falls back on Thabit signing as a witness. Thabit himself declares that he signed only as a witness. This is almost the most unconvincing statement I have met even in a long experience in these Courts. Thabit bin Muktar is a professional lawyer who has been constantly dealing in land and with deeds for the last many years and is produced by the Claimant as the general expert on these matters, and when he tells the Court that he did not know the contents of the document or that he does not know who signed as a principal with the Seal opposite his name and the ordinary witnesses signing in the usual places, I have no option but to disbelieve him. Thabit bin Muktar himself explains that Mahomed bin Matano signed as Sheikh of the Tangana because a Sheikh of Kilindini is the same as a Sheikh of the Tangana. It is quite clear that this is not so and it is only another attempt to explain the incongruity of the matter.

Sheikh Abdullah gives evidence that the only person who can sell tribal land is the Sheikh in consultation with the Wazee. No consultation took place in this case.

Sheikh Abdullah gives evidence that his father pointed out the present boundaries twenty-four years ago and that they are the same

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as now, that is to say the railway line and an imaginary line from Ras Mzimli. That these ever were the boundaries is quite absurd, that for the railway which had never heard of the boundary to elect to run along it is unthinkable and the boundary on the east is purely an imaginary line, which excludes any European building. The boundaries were in my opinion invented for the purpose of this action to exclude land occupied by Europeans. I do not believe that the Sheikhs or Wazee ever had a right by tribal custom to alienate any land. The only way that a person could get a right to land was by permanent occupation and then he could alienate without anyone's permission. This I believe to be true on the Island of Mombasa.

I find very little to connect the Three Tribes or the Tangana in particular with the portion of the Island now claimed. I think it very doubtful if they ever came to any extent to the south or east of the land now claimed by the Sheriffu. I am satisfied that the Kilindini occupied a village near the Ruined Mosque, at the juncture of the railway lines (X on Ex: II & D on my plan), and it is probable that the Tangana lived to the north and east of this, as their cemetery and name still remain there. It is also necessary to note that there is a Kilindini and Tangana quarter in Mombasa town to the south-west of the Kusi Makupa Road.

The Kilindini village was destroyed in 1828 and no trace of it remains, which shows that it was only the ordinary flimsy village now used and not a well built town like the Ruined Town. The Tangana village may well have disappeared at the same time.

With the vast amount of evidence before me it is impossible to comment on it at length, and I can only say that I agree with the learned Recorder in saying that much has been contradictory and unreliable.

Also a great deal is inadmissible and much irrelevant.

RECAPITULATION.

To recapitulate—

(1) The documents are official appointments and give no title to the land.

(2) The custom of frequenting the Mzimli is no evidence of anything.

(3) The granting of permission to erect fishing stakes is no evidence of title.

(4) The evidence as regards permission to cultivate is very weak and also very untrustworthy. If true it would not substantiate any ownership in the land.

(5) I have sufficiently dealt with the songs to show that nothing can hang on them.

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ABDULLAH BIN SHEIKH BIN YUNUS and MACMILLAN v. WAKF COMMISSIONERS. C.A. 12/1913

(6) The same with regard to the occupation by Mohamed bin Abdullah.

No one of the Appellants' grounds has any material weight nor are they any use to strengthen each other. There is to my mind no evidence to support a title to the land in the Three Tribes or their Sheikh.

The appeal is dismissed with costs.

(Appeal dismissed.)

ORIGINAL CRIMINAL.

Before HAMILTON, C. J.

IN THE MATTER OF AN APPLICATION BY M. S. PATEL O.CR. 105/1913

(December, 1913.)

Indian Criminal Procedure Code Section 526—Transfer of case by High Court from one Magistrate to another—Procedure by Magistrate when accused person notifies the court of his intention to apply to the High Court—Reasonable grounds must exist for transfer.

Held:—In a Summons Case when an accused person notifies the Magistrate of his intention to apply to the High Court for a transfer, the Magistrate is not entitled to proceed with the case and require the accused to cross-examine witnesses in his defence.

Held also:—The true test for making an order for transfer is not whether or not the Magistrate is biased but whether a reasonable apprehension exists in the mind of the accused from incidents which have occurred that he may not have a fair and impartial trial.

The Applicant in Person.

O. Daly, for the Crown.

The facts leading up to the application are set out in the order following :—

HAMILTON C. J.—This is an application for transfer of Criminal Case No. 80 of 1913 of the Court of the Town Magistrate, Lamu, to

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some other Court under Section 526 of the Criminal Procedure Code.

It appears that the accused, who is an advocate of this Court at present practising at Lamu, was summoned by his servant for assault. Before the hearing he notified the Magistrate that he intended to apply to the High Court for a transfer under Section 526, sub-sections a.e.

On the matters set forth in the affidavit filed by the applicant I am unable to see that good grounds existed then which would have justified an order for transfer.

The affidavit, however, supported by the record and the forwarding letter of the Magistrate shows that the Magistrate insisted on proceeding with the case and directed the applicant to cross-examine the witnesses for the prosecution.

The Magistrate apparently considered that he was justified in taking this course, relying on a reference to the case of *Jaharradin* (1) in the notes to Section 526 in Henderson's Procedure Code, where it is stated that it is competent to the Magistrate before granting an adjournment to proceed with the case up to the point at which the accused would be called upon for his defence.

The note is correct as far as it goes, but the case referred to was a sessions case in which the Sessions Judge was competent to take the evidence for the prosecution inasmuch as the accused was not put on his defence till the close of the case for the prosecution.

This case, however, is a summons case in which by the procedure laid down in Section 242 of the Criminal Procedure Code an accused person is put on his defence at the commencement of the proceedings. I am therefore of opinion that the Magistrate should have adjourned the case under sub-section 8 to Section 526 and that all the proceedings before him subsequent to the notification by the accused of his intention to apply for transfer were illegal.

Now, the affidavit further sets out (1) that the Magistrate sent for the applicant in Chambers and told him he considered the application an insult to the Court and urged him to withdraw it, warning him that the result would be serious if he persisted with it: (2) that he refused a short adjournment to allow the accused to consult counsel: and (3) that he refused to allow the accused to cross-examine the complainant as to a compromise that was alleged to have taken place subsequent to the alleged assault or to make a note of his questions.

On these facts the applicant urges that a reasonable apprehension was created in his mind that the Magistrate had formed an opinion adverse to his case.

(1) I.L.R. XXXI. Cal. 715.

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In the matter of an application by PATEL, M. S. O. CR. 105/1913

I am not here concerned with an issue as to whether the Magistrate was in fact likely to be partial or impartial and I am perfectly prepared to believe that the accused would have received a fair trial at his hands. But the test to be applied in such cases as this has been settled in various cases in the Indian Courts and I would refer particularly to the Judgment of the Calcutta High Court in *Dupeyron* v. *Driver*† at page 498, where the Judges say :—

> " Where the apprehension in the mind of the accused that he may not have a fair and impartial trial is of a reasonable character, there, notwithstanding that there may be no real bias in the matter, the fact of incidents having taken place calculated to raise such reasonable apprehension ought to be a ground for allowing a transfer."

Looking at the incidents which have been sworn to by the applicant in this matter I am unable to say that the apprehension raised in his mind was unreasonable, and I therefore think it is desirable that an order for transfer should be made and I direct accordingly that the case be transferred to the Court of the Provincial Commissioner and be heard by Mr. Isaac as soon after his arrival in Lamu as may be convenient.

(*Application allowed.*)

† I.L.R. XXIII. Cal. 498.

ORIGINAL CIVIL.

Before BONHAM CARTER, J.

A. H. JAMES *v.* JAFFER DEWJI. O.C. 104/1913 (December 1913.)

Agreement for the sale of land—Error exceeding 10 per cent. in the computation of the area—Action for specific performance—Relief.

Plaintiff agreed to purchase from the Defendant a plot of land on Mombasa Island for £1,500. The area of the land was described in the agreement as being one and a half acres or thereabouts. Before the deed was executed Defendant informed

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Plaintiff that the area was only 1·34 acres. Plaintiff thereupon tendered £1,344, representing a deduction of £156 on account of the error in computation reckoned on the basis of £1,000 an acre. The Defendant refused to allow any deduction or to complete the sale at a less figure than the £1,500 agreed upon.

Held:—The mistake in computation amounting to between 10 and 11 per cent. of the whole area, the Plaintiff was entitled to have the plot conveyed to him on payment of £1,344.

A. M. Morrison, for Plaintiff.—The word "thereabouts" must give an approximation to the area. In support of this contention he cited *Morris* v. *Levison* (1), *The Resolven* (2), *Cross* v. *Eglin* (3), *Winch* v. *Winchester* (4), *Hill* v. *Buckley* (5), *Leslie* v. *Thompson* (6).

The plaintiff is entitled to deduction from the price by way of compensation; see *Jolliffe* v. *Baker* (7).

G. G. Atkinson, for Defendant.

The proposal to buy at £1,500 came from the Plaintiff, who knew the plot he intended to purchase. The word "thereabouts" is therefore to be interpreted widely and the error in computation, though exceeding 10 per cent., is therefore not sufficiently material to justify the Plaintiff in attempting to get the price reduced.

BONHAM-CARTER, J.—The first issue is the acreage of the plot in question. I have no doubt that it is 1·344 acres.

The second issue is whether the Defendant was aware of the acreage by the Recorder's map when he instructed Mr. Home.

I do not think it is proved that he was; but he did not know that it was considerably less than 1·522 acres since the Government had taken a 30 foot strip from him.

The third issue is whether 1·344 acres are "1½ acres or thereabouts." I do not think so; there is a difference of between 10 per cent. and 11 per cent. and on the authorities quoted to me such a difference is not to be covered by the words.

The Plaintiff is entitled to specific performance of the contract on payment of £1,344. Judgment for that relief and costs.

(*Judgment for Plaintiff.*)

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(1) 1 C.P.D., p. 155.
(2) 9 T.L.R., p. 75.
(3) 2 B. & A., p. 106.
(4) 1 Vesey & Beans, p. 375.
(5) 17 Vesey, p. 394.
(6) 9 Hare, p. 270.
(7) 11 Q.B.D., p. 255.

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COURT OF APPEAL FOR EASTERN AFRICA.

Before MORRIS CARTER, C.J. UGANDA, BONHAM CARTER AND KING FARLOW, J.J.

OL LE NJOGO AND OTHERS *v.* THE ATTORNEY GENERAL AND OTHERS, (known as the Masai case). COURT OF APPEAL $\frac{7}{1913}$ (December, 1913.)

Protectorate, status of—Jurisdiction of the Crown in—Foreign Jurisdiction Act, 1890—Power of the Governor under instructions from a Secretary of State to enter into a Treaty with a native tribe being within the Protectorate—Jurisdiction of Municipal Courts in an action brought by members of the tribe against the Government for breach of agreement—Act of State.

Held:—The East Africa Protectorate is in relation to the Crown a foreign country in which the Crown has jurisdiction which is exercisable in accordance with the Foreign Jurisdiction Act, 1900, and Orders in Council thereunder.

Held also:—The Masai, though living in the Protectorate under the protection of the Crown, were capable of entering into agreements with the Governor, and such agreements were in fact treaties, and as such claims thereunder are not cognizable in the Protectorate Courts.

Held also:—Acts of officers ratified by the Government which were done towards giving effect to such treaties were acts of State.

The facts and circumstances giving rise to the action are sufficiently set out in the judgments of the High Court and the Court of Appeal.

On the case coming on in the High Court the Attorney General raised a plea in bar of jurisdiction that the agreements in question were treaties and the acts complained of acts of State.

The High Court upheld this plea and dismissed the action in the following judgment.

A. D. Home, for Plaintiffs.

R. M. Combe, Attorney General, for the Government.

HAMILTON, C.J.—The action having been set down for argument on a preliminary point of law only on the issue of jurisdiction as raised on the pleadings by the Attorney General, the only question that I have now to decide is whether the claims of the Plaintiffs are cognizable by this Court.

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Mr. Home has argued on their behalf that it is not sufficient for the Government merely to plead "act of State," but that it is incumbent on the Court to scrutinize those acts which are alleged to be acts of State so as to be able to decide whether they in fact are or are not acts of State, and that for this purpose it will be necessary to take evidence generally and particularly on the point of the alleged fiduciary relationship between the Secretary of State and the Masai tribe. He wishes to put in evidence speeches in the House of Commons.

I agree that the Court must satisfy itself as to the real nature of the acts which are claimed to be acts of State, but here all the facts relied on are fully set out by the Defendants in the pleadings, so that in my view the Court is in a position to form an opinion regarding their true nature, without the necessity of taking evidence generally or considering speeches in the House of Commons which do not create legal obligations.

Now, for the contention of the Government to succeed it must be shown on the facts pleaded that the acts of which the Plaintiffs complain are really such acts of State as are not cognizable by any Municipal Court. These facts are shortly as follows:—

In 1904 the then Commissioner of the Protectorate entered into an agreement with the Chief and certain representatives of the Masai tribe by which *inter alia* it was arranged that certain sections of the tribe should remove to a reserve at Laikipia. This removal took place and the tribe was consequently divided in two.

In 1911 the then Governor of the Protectorate entered into another agreement with the Chief, his regents and certain representatives of that portion of the tribe living at Laikipia by which it was arranged that the sections of the tribe which under the former agreement had removed to Laikipia should move south into one reserve with the remainder of the tribe.

Both of these agreements were made by the Government acting on instructions from and with the sanction of the Secretary of State.

The Attorney General contends that these agreements were in effect treaties, while the Plaintiffs prefer to call them agreements, though in their concise statement the 1904 agreement, on which they rely, is called by them a treaty. For the present I call them agreements.

The material portions of these two agreements are as follows:—

AGREEMENT OF 1904.

> We, the undersigned, being the Lybon and chief (representatives) of the existing clans and sections of the Masai tribes in the East Africa Protectorate, having, this 9th day of August, 1904, met Sir Donald Stewart, His Majesty's

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Commissioner for the East Africa Protectorate, and discussed fully the question of a land settlement scheme for the Masai, have of our own free will decided that it is for our own best interests to remove our people, flocks and herds into definite reservations away from the Railway line and away from any land that may be thrown open to European settlement.

We have, after having already discussed the matter with Mr. Hobley at Naivasha and Mr. Ainsworth at Nairobi, given this matter every consideration, and we recognize that the Government, in taking up this question, are taking into consideration our best interests.

Now we, being fully satisfied that the proposals for our removal to definite and final reserves are for the undoubted good of our race, have agreed as follows:—

That the Elburgu, Gekunuki, Loita, Damat, and Laitutok sections shall remove absolutely to Laikipia, and the boundaries of the Settlement shall be, approximately, as follows:—

* * * * * *

And by the removal of the foregoing sections to the reserve we undertake to vacate the whole of the Rift Valley, to be used by the Government for purposes of European settlement. Further, that the Kaptei, Matapatu, Ndogalani, and Sigarari sections shall remove into the territory originally occupied by them to the south of Donyo Lamayu (Ngongo), and the Kisearian stream, and to comprise within the area the Donyo, Lamayu, Ndogalani and Matapatu Mountains and the Donyo Narok and to extend to Sosian on the West.

In addition to the foregoing, Lenana, as chief Lybon, and his successors, to be allowed to occupy the land lying in between the Mbagathi and Kisearian streams from Donyo Lamuyu to the point where both streams meet, with the exception of land already occupied by Mr. Oulton, Mr. McQueen and Mr. Paterson.

In addition to the foregoing, we ask that a right of road to include certain access to water be granted to us to allow of our keeping up communications between the two reserved areas, and further, that we be allowed to retain control of at least five square miles of land (at a point on the slopes of Kinangop to be pointed out by Legalishu and Masakondi),

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whereat we can carry out our circumcision rites and ceremonies, in accordance with the custom of our ancestors.

We ask as a most important point in this arrangement, that the Government will establish and maintain a station on Laikipia, and that Officers whom we know and trust may be appointed to look after us there.

Also that the Government will pay reasonable compensation for any Masai cultivation at present existing near Nairobi.

In conclusion, we wish to state that we are quite satisfied with the foregoing arrangement, and we bind ourselves and our successors, as well as our people, to observe them.

We would, however, ask that the settlement now arrived at shall be enduring so long as the Masai as a race shall exist, and that European or other settlers shall not be allowed to take up land in the settlements.

In confirmation of this Agreement, which has been read and fully explained to us, we hereby set our marks against our names as under:—

LENANA, son of Mbatian, Lybon of all the Masai.
MASAKONDI, son of Arariu, Lybon at Naivasha.

Signed at Nairobi, August 15th, 1904:—

LEMANI, Elmura of Matapatu.
LETEREGI, do.
LELMURUA, Leganan of Kapte.
LAKOMBE, Elmura of Kapte.
LIMGISONG, Elmura of Ndogalani.
LISIARI, do.
MEPAKU, Head Elmoran of Matapatu.
LAMBARI, Leganon of Ndogalani.

Naivasha, representing Elburgu, Gekunuku, Loita, Damat and Laitutok:—

LEGALISHU, Leganan of Elburgu.
OLMUGEZA, do.
OLAINOMODO, do.
OLOTOGIA, do.
OLIETI, do.
LANAIRUGU, do.
LINGALDU, do.
GINOMUN, do.
LIWALA, Leganan of Gekunuki.
LEMBOGI, Leganan of Laitutok.

Signed at Nairobi, August 15th, 1904:—

SABORI, Elmura of Elburgu.

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I, Donald Stewart, K.C.M.G., His Majesty's Commissioner for the East Africa Protectorate, hereby agree to the foregoing, provided the Secretary of State approves of the Agreement, and in witness thereof I have this 10th day of August, 1904, set my hand and seal.

AGREEMENT OF 1911.

We, the undersigned, being the Paramount Chief of all the Masai and his regents and the representatives of that portion of the Masai tribe living in the Northern Masai Reserve, as defined in the agreement entered into with the late Sir Donald William Stewart, Knight Commander of the Most Distinguished Order of Saint Michael and Saint George, His Majesty's Commissioner for the East Africa Protectorate, on the ninth day of August, one thousand nine hundred and four, and more particularly set out in the Proclamation of May thirtieth, one thousand nine hundred and six and published in the Official Gazette of June first, one thousand nine hundred and six, do hereby on our own behalf and on behalf of our people, whose representatives we are, being satisfied that it is to the best interest of their tribe that the Masai people should inhabit one area and should not be divided into two sections as must arise under the agreement aforesaid whereby there were reserved to the Masai tribe two separate and distinct areas of land, enter of our own free will into the following agreement with Sir Edouard Percy Cranwill Girouard, Knight Commander of the Most Distinguished Order of Saint Michael and Saint George, Member of the Distinguished Service Order, Governor and Commander in Chief of the East Africa Protectorate, hereinafter referred to as the Governor.

We agree to vacate at such time as the Governor may direct the Northern Masai Reserve which we have hitherto inhabited and occupied and to remove by such routes as Governor may notify to us, our people, herds and flocks to such area on the South side of the Uganda Railway as the Governor may locate to us, the said area being bounded approximately as follows and as shown on the attached map.

* * * * * *

Provided that nothing in this agreement contained shall be deemed to deprive the Masai tribe of the rights reserved to it under the agreement of August ninth one thousand nine

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hundred and four aforesaid to the land on the slopes of Kinopop whereon the circumcision rights and ceremonies may be held.

In witness whereof and in confirmation of this agreement which has been fully explained to us we hereby set our marks against names as under:—

Mark of SEGI, son OL-ONANA (Lenana), Paramount Chief of all the Masai.

Mark of OL-LE-GELESHO (Legalishu), Regent during the minority of Segi, head of the Molelyan Clan, Chief spokesman (Ol-aigwenani) of the Il-Kitoip (Il-Merisho) age-grade of the Purko Masai.

Mark of NGAROYA, Regent during the minority of Segi of the Aiser clan.

Mark of OL-LE-YELI, head of the Mokesen Clan of the Purko Masai, and one of the spokesmen (Ol-aigwenani) of the Il-Kitoip (Il-Merisho) age-grade of the Purko Masai.

Mark of OL-LE-TURERE, head of the Mokesen Clan of the Purko Masai.

Mark of OL-LE-MALIT, one of Masikondi's representatives, of the Lughumae branch of the Aiser Clan of the Purko Masai.

Mark of OL-LE-MALITE, one of Masikondi's representatives,of the Lughumae branch of the Aiser Clan of the Purko Masai.

Mark of OL-LE-NAKOLA, head of the Tarosero Clan of the Purko Masai.

Mark of OL-LE-NAIGISA, head of the Aiser Clan of the Purko Masai.

Mark of MARMAROI, uncle and personal attendant of Segi.

Mark of SABURI, the Prime Minister of the late Chief Ol-onana (Lenana) and principal elder of the Southern Masai Reserve.

Mark of AGALI, uncle of Segi, representing the Loita Masai.

Mark of OL-LE-TANYAI of the Tarosero Clan, chief spokesman (Ol-aigwenani) of the Lemek (Meitaroni) age-grade of the Purko Masai.

The above set their marks to this agreement at Nairobi on the fourth day of April, nineteen hundred and eleven.

A. C. HOLLIS,
Secretary, Native Affairs.

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OL-LE-MASIKONID, head of the Lughumas section of the Aiser Clan; chief elder of the Purko Masai, called in the former treaty Ol-Oiboni of the Purko Masai.

OL-LE-BATIET, head of the Aiser Clan of the Purko Masai on Laikipia, Ol-Aigwenani of the age known as Il-Merisho.

The above set their marks to this agreement at Rumuruti on the 13th day of April, nineteen hundred and eleven.

E. D. BROWNE.
Assistant District Commissioner, Laikipia.

In consideration of the above, I, Edouard Percy Cranwill Girouard, Knight Commander of the Most Distinguished Order of St. Michael and St. George, Member of the Distinguished Service Order, Governor and Commander-in-Chief of the East Africa Protectorate, agree, on behalf of His Majesty's Government, but subject to the approval of His Majesty's Principal Secretary of State for the Colonies, to reserve for the exclusive use of the Masai tribe the area on the South side of the Uganda Railway, as defined above, and to undertake, on behalf of His Majesty's Government to endeavour to remove all European settlers from the said areas, and not to lease or grant any land within the said areas (except such land as may be required for mining purposes or for any public purpose) without the sanction of the Paramount Chief and the representatives of the Masai tribe.

In witness whereof, I have hereunto set my hand and official seal this twenty-sixth day of April, one thousand nine hundred and eleven.

Signed, sealed and delivered by the within named Sir Edouard Percy Cranwill Girouard in the presence of A. C. Hollis. L.S.

E. P. C. GIROUARD.

The parties to the first agreement are "the Lybon and Chief (representatives) of the existing clans and sections of the Masai tribes in the East Africa Protectorate" and H.M. Commissioner acting under instructions from the Secretary of State.

The parties to the second agreement are "the Paramount Chief of all the Masai and his regents, and the representatives of that portion of the Masai tribe living in the Northern Masai Reserve as defined in the former agreement," and the Governor acting under instructions from the Secretary of State.

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Now, both these agreements were entered into by the representatives of the Crown in the East Africa Protectorate in which the King exercises powers by virtue of the Foreign Jurisdiction Act, 1890, and for which with the advice of his Privy Council he ordered in 1902 (1) that:—

> "The Commissioner shall administer the Government of East Africa in the name and on behalf of His Majesty and shall do and execute in due manner all things that shall belong to his said command and to the trust thereby reposed in him, according to the several powers and authorities granted or appointed to him by virtue of this Order and of his commission and according to such instructions as may from time to time be given to him under His Majesty's Sign Manual and Signet, or by Order of His Majesty in Council, or by His Majesty through a Secretary of State, and according to such laws as are or shall hereafter be in force in the Protectorate."

The Commissioner therefore in 1904, and the Governor (with like power) in 1911 were both consequently acting within their authority in entering into the agreements mentioned "on the instructions of His Majesty through a Secretary of State."

Now, the other parties to these agreements were persons whom the Commissioner and Governor, acting on behalf of the Crown, chose as representatives of the Masai tribe with whom the Crown could enter into such agreements. The Masai tribe, as living within the limits of the East Africa Protectorate, are not subjects of the Crown, nor is East Africa British territory. But East Africa, being a Protectorate in which the Crown has jurisdiction, is in relation to the Crown a foreign country under its protection, and its native inhabitants are not subjects owing allegiance to the Crown, but protected foreigners who in return for that protection owe obedience.

For this view as to the status of a Protectorate "which has never been acquired by settlement, or ceded to, or conquered, or annexed by His Majesty, or recognized by His Majesty as part of his dominions," and of the status of the native inhabitants thereof I need only refer to the case of the *King* v. *the Earl of Crewe* (2).

The real parties to these two agreements are therefore on one side the Crown and on the other the paramount chief and leading representatives of a native tribe in a foreign country under the protection of the Crown.

The main matters which are the subject of the agreements are the areas which the protecting power of the country is to reserve for

(1) Order in Council 1902 (3).
(2) 2 K.B. 1910, p. 577

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OL LE NJOGO and others v. ATTORNEY GENERAL and others. Court of Appeal 7 1913

that tribe as apart and distinct from the subjects of the Crown living in the same country.

In my opinion there is here no legal contract as alleged between the Protectorate Government and the Masai Signatories of the agreements, but the agreements are, in fact, treaties between the Crown and the representatives of the Masai, a foreign tribe living under its protection. I will now consider the Plaintiffs' claims and the acts of which they complain.

The Plaintiffs claim as individuals and also on behalf of the Masai of Laikipia and also on behalf of the Masai Tribe generally, that the treaty made between the Masai and H.M. late Commissioner, Sir Donald Stewart, in 1904 is still in force and effect and that the obligations undertaken therein are still binding on H.M. Government.

The Defendants Nos. 2–19 are brought on the record as signatories to the agreement made in 1911 whereby they agreed that they and the other Masai should leave Laikipia, and it is alleged that these Defendants having no authority to enter into such an agreement, such an agreement is void except as regards the said Defendants.

The first three Plaintiffs and the other Masai of Laikipia, it is stated, have been and are being wrongfully removed from the Laikipia District in breach of the said agreement of 1904.

The Plaintiffs therefore claim :—

1. A declaration against the Defendants Nos. 1, 20 and 21, that the Plaintiffs and the other Masai of Laikipia and the other members of the Masai Tribe generally with the exception of the Defendants Nos. 2 to 19 inclusive are still entitled to
   (*a*) the Laikipia District extended as aforesaid as equitable tenants in common in unbarable entail; and
   (*b*) to an easement of road as aforesaid between the Northern and Southern Masai Reserves; and
   (*c*) that the 1911 agreement is not binding on the Plaintiffs and the other Masai of Laikipia and the other members of the Masai Tribe generally with the exception of the Defendants Nos. 2 to 19.
2. To £5,000 damages against the 1st Defendant for failing to provide the road as agreed in the 1904 agreement, and
3. To an enquiry as to damages against the 1st, the 20th and the 21st Defendants
   (*a*) arising from the death of stock occasioned by such stock being illegally removed from the Laikipia District;

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(*b*) arising from the depreciation on the value of stock wrongfully removed from the said Laikipia District.

4. All necessary accounts and inquiries and such further and other relief as the nature of the case may require.
5. As against the 20th and 21st Defendants an injunction restraining them from preventing the return of the Plaintiffs and their stock to the Laikipia District; and against them compelling any of the Laikipia Masai and their stock to move from the said Laikipia District.
6. Costs.

The above reliefs with the exception of No. 5 are claimed against the Crown and Nos. 1, 3 and 5 also against the 20th and 21st Defendants, on the grounds that the Government having by the 1904 agreement become trustees for the Masai, they failed to execute their trust, but entered into another agreement in 1911 contrary to the former one and derogatory to the interests of their "cestuisque trust," and that the later agreement was obtained by duress, and is further not binding, as it has not received the approval of the tribe, and that the losses they allege they have suffered are due to the Government executing the terms of the second agreement in violation of the first which still continued to exist.

Now, are the acts of Defendants, complained of by the Plaintiffs, acts of State? The answer to this is in my opinion contained in my finding that both the agreements are in fact treaties. For it follows from that finding that there was no such contractual relationship as alleged between the parties, and that in this action the Plaintiffs are seeking by means of the Court to enforce the provisions of a treaty. The paramount chief himself could not bring such an action, still less can his people, *Feather* v. *Queen* (1) and *Buron* v. *Denman* (2).

As regards the plea of duress and the want of approval of the tribe to the second agreement, as affecting its validity, it is not within the competence of this Court, having held the agreement to be a treaty, to consider its validity as affected either by the "pourparlers" before its signature or a want of authority on the part of the signatories.

As to the alleged losses incurred by the Plaintiffs they themselves plead that Defendants 20 and 21 were the agents of the Government acting in pursuance of the Orders of the Government or Secretary of State in carrying out the second agreement, which pleading is accepted by both of these Defendants as their defence. Such an action as against them is founded on tort and will not lie, and their acts in carrying out the terms of a treaty having been on instructions from and adopted by the Government are as much acts of State as the treaty itself.

(1) 35 L. J. K. B. 208. (2) 6 State Trials N.S. 525.

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Relief 5 claimed as against these Defendants for similar reasons is not one that this Court could grant, as it would in its crudest form be an injunction to Officers of the Government to prevent them carrying out an act of State.

The remaining Defendants on the record are merely nominal as signatories to the 1911 agreement and no relief is claimed as against them.

I hold therefore on the issue before me that the acts of the Defendants complained of by the Plaintiffs are in fact acts of State which are not cognizable by a Municipal Court.

The Crown acting through its Commissioner first made one treaty with the Masai, and subsequently, acting through the Governor, modified that treaty by another, and I cannot do better than adapt to the present case the concluding words of Lord Kingsdown in giving judgment in the Privy Council in the case of *Secretary of State for India* v. *K. B. Sahaba* (1).

"It may have been just or unjust, politic or impolitic, beneficial or injurious, taken as a whole, to those whose interests are affected. These are considerations into which this Court cannot enter. It is sufficient to say that even if a wrong has been done, it is a wrong for which no Municipal Court of Justice can afford a remedy."

The action is dismissed with costs.

Against this Judgment the Plaintiffs appealed to the Court of Appeal.

A. Morrison appeared for the Appellants; *R. M. Combe, Attorney General*, for the Government and the two Government officers who had been made Defendants. The other Defendants were unrepresented.

Morrison.—We have here to deal with existing facts. The position is different from what it was thirty years ago. British rule and British Courts have now been established in the country. The Masai are not foreigners in the Courts and a British subject has no privilege over them. A treaty can only be entered into with an independent Sovereign State, the chief of which is not subject to the jurisdiction of the Courts as is the Chief of the Masai. See *Secretary of State for India v. K. B. Sahaba* (2), and the East Africa Order in Council, 1902.

If the Masai took up arms against the Government they would be rebels, liable to penalties for treason, that is to say they have

(1) XIII. Moore 22.
(2) Supra.

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the liabilities and equally the privileges of subjects. See *Nawab of the Carnatic* v. *East India Co.* (1), and section 121, Indian Penal Code.

The existing jurisdiction of the Crown at the time of the passing of the Foreign Jurisdiction Act, 1900, must be exercised in accordance with the Order in Council, 1902. In 1902, an action for tort would have lain under the Civil Procedure Code. In 1910, the Petitions of Right Ordinance was enacted giving every private person a right to sue the Government in circumstances under which a Petition of Right could be brought in England; it would be no answer to such a suit to say to the Plaintiff, "You are a protected foreigner and the act you complain of is an act of State."

The power of the Crown in East Africa is only exercisable in accordance with the law.

The Bechuanaland Protectorate Order in Council, 1891, is of more limited effect than the East Africa Order in Council, 1902.

In East Africa a Legislative Council has been established, the acts of which are binding on the Masai, with whom no element of sovereignty remained. There is in fact no distinction between this Protectorate and a Crown Colony.

In the case of *The King* v. *Earl of Crewe* (2) the question as to whether Sekgome was a British subject did not arise. This case should be read in the light of Calvin's case (3), where "alien" is defined. A Masai is not an alien in the Courts of the Protectorate; whether he is a British subject or not is irrelevant.

A protected foreigner is entitled to the full protection of his rights of the English law, a protected foreigner can bring a Petition of Right, and it is no more a defence in his case than in the case of a subject to plead "act of State."

He here referred to in re *Henry Adam* (4), *Sparenbergh* v. *Bannatyne* (5), and to Robertson's "Civil Proceedings Against the Crown," p. 365.

The 1904 Agreement was merely an agreement as to tenure under which the Masai acquired legal rights enforceable in the Courts, see *Nircaha* v. *Baker* (6). Under the judgment of the High Court a squatter refusing to leave the land reserved by the agreement for the Masai could only be ejected by an act of State.

The governing principle of the Indian cases is that where the Courts have jurisdiction the Government cannot make treaties but only agreements. He here referred to *Hari Sadashir* v. *Shaikh*

(1) 2 Vesey junr., 56.
(2) L.R. II. K.B. 576.
(3) 7 Coke.
(4) 1 Moore p. 459.
(5) 1 Bos. and K. 163.
(6) 1901 Ap. Cases 561.

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Ajmuddin (1), *Nawab of Carnatic* v. *East India Company* (2), *Forrester and others* v. *Secretary of State for India* (3), and *Rajah Saligram* v. *Secretary of State for India* (4), also *Cook* v. *Sprigg* (5).

It is not open to the Crown to recognize any part of the territory as exempt from the jurisdiction of the Courts by an Arbitrary Act. To recognize the sovereignty of the Masai, would be to oust the jurisdiction of the High Court.

Evidence should have been taken by the lower Court as to the status of the Masai, when it would have appeared that the tribe was fully administered and not a Sovereign State.

Combe—I admit that if Masai were British subjects the plea of Act of State would not have availed. The Crown exercises jurisdiction here under the Foreign Jurisdiction Act, 1890, see the recital as to foreign countries: East Africa falls under Section 1. The 1902 Order in Council and subsequent Orders are under the Act. All the legislation is here for a foreign country. It is not open to the Courts to say it is not and to force the Crown to acquire territory and subjects. Under the 1906 Order in Council, article 9, the Crown can legislate for the Protectorate by an Ordinance made in Downing Street.

Orders in Council apply to the Protectorate as a whole, no distinction is made between the territories of the Sultans of Zanzibar and Witu or of lands occupied by native tribes, but the jurisdiction of the Courts over all persons is subject to the words in accordance with English law under which Sovereigns and Ambassadors would be exempt.

There is a material difference between the position of a British subject and of a native of the Protectorate, which was distinctly mentioned in the British Protectorate Neutrality Order in Council, 1904. The Government has always recognized a concurrent jurisdiction with that of our courts in some of the native chiefs. See the Native Courts Regulations, 1897, section 46, and the Courts Ordinance, 1907, section 10. Such jurisdiction is not granted under the Foreign Jurisdiction Act.

Because it has been laid down in what manner certain powers of the Crown which it may have in a foreign country are to be exercised the Crown is not thereby precluded from exercising its other powers. The treaty-making power remains, whether it be exercised with regard to a native tribe or the Sultan of Zanzibar.

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(1) L.R. xi. Bom. 325.
(2) Supra.
(3) L.R Indian App. Supplementary Vol., p. 10.
(4) „ „ „ „ 119.
(5) 1899 App. Cases 572.

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The Appellant admits that thirty years ago the agreement with the Masai would have been a treaty.

There is no law to prevent the Crown using force to a protected foreigner if he is not obedient.

If necessary force could have been used to move the Masai tribe; if that is so no action will lie merely because more peaceful methods were in fact used.

He referred to *Baron* v. *Denman* (1), *Feather* v. *Queen* (2) and Robertson's "Civil Proceedings against the Crown," p. 640. A native member of a tribe is a subject of the head of the tribe, whether the "head" be an individual or more persons than one, and it is for the Crown alone to say with whom it will make a treaty. The treaty in question was for the removal of a tribe and cannot be read as an agreement to exchange land, and had a European remained on the land reserved for the tribe, the Crown could have had him removed through the Courts. The obligations imposed here on both parties were moral, not legal. There was no declaration of legal trusteeship by the Secretary of State. He referred to *Rustomji* v. *The Queen* (3) and *West Rand and Central Gold Mining Co.* v. *The King* (4). As regards the 20th and 21st Defendants they are protected in carrying out an act of State against persons who are not British subjects. In the case of *Walker* v. *Baird* (5) the complainant was a British subject. In any event the Appellants pleaded that they acted by orders of the Secretary of State, therefore they cannot sue them in tort.

Before the passing of the Petition of Rights Ordinance the Crown could not be sued in tort inasmuch as the principles of English law applied. The Ordinance itself only allows the bringing of Petitions of Right by such persons as could bring them in England. Although the Crown has recognized certain persons as capable of making a treaty, it does not necessarily follow that it should recognize them as being outside the jurisdiction of the Courts with the privileges of a sovereign. See *Sekgome's case* at p. 615 (6).

Nireaha v. *Baker* (7) only decided that statute must be complied with in dealing with land. In the case of *Huri Sadashir v. Shaikh Ajmuddin* (8), the persons were not sovereigns but subject to the Rajah.

Morrison in reply :—

Where there is no great seal attached the presumption is that there is no treaty.

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(1) 2 Excheq. Rep. 157.
(2) 35 L.J. at 208.
(3) 46 L.J. 238.
(4) 1905, 2 K.B. 391.
(5) 1892 App. Cases 491.
(6) Supra.
(7) Supra.
(8) Supra.

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The complete exercise of the jurisdiction of the Crown in the Protectorate in fact places the subjects of the Protectorate on the same footing as British subjects. The sovereignty of the Masai has never in fact been recognized. The signatories of the 1904 Agreement were delegates of the tribe.

He referred to Hall's "Jurisdiction of the British Crown," 1894 Ed., p. 204.

The Protectorate Courts have been given full jurisdiction which they have no right to question because of a treaty to the contrary, unless the Order in Council directs that it shall be exercised subject to the treaty, as for instance was done in the Order in Council, 1897, with regard to Germany, which provision is kept alive by Art. 28 of the Order in Council, 1902. This Order is drawn as applicable to absolute sovereignty without any exception, whether at the coast or in the hinterland.

The Crown has assumed ownership of minerals and grants rights in land. Annexation now would merely be a formal recognition of the actual existing state of affairs.

The exercise of jurisdiction by native chiefs is only by consent of the parties and does not imply sovereignty. There is no case in which "act of State" has been successfully pleaded where the person aggrieved was an alien within the protection of His Majesty or subject to the ordinary jurisdiction of the Courts. If the Masai had been compelled to move by force and protested without resisting, they could thereafter have brought an action which would have been entertained in the Courts.

The Petition of Rights Ordinance gives a Masai the same right to bring an action in the Protectorate as he would have if living in England.

The Crown is in fact claiming in this case to do by prerogative powers that which it has power to do by legislative act.

At the request of the Court in order to have on the record historical and ethnographical information as to the Masai in the event of an appeal going to the Privy Council, counsel agreed on the following admissions:—

"On behalf of our respective clients we admit for the purposes of this appeal the approximate accuracy of the statements contained in Sir Charles Eliot's introduction to a work by Mr. A. C. Hollis, entitled "The Masai" (Oxford, Clarendon Press), at pages xiv., xv., xvi., xvii., xviii. and in the memorandum on the Masai, which forms enclosure No. 2 in serial No. 17 of the White Book "Correspondence relating to the Masai, June, 1911," commencing at the paragraph headed "Past History" on page 14, and ending with the paragraph

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on "Masai Migrations" on page 15, with the omission of the paragraph headed "Arrival of Settlers."

"And we further admit that since 1904 the Masai have increased in population and wealth, and the result of a rough and other census in 1913 was to place the population at thirty thousand."

The Court delivered the judgments following dismissing the appeal.

MORRIS CARTER, C.J., UGANDA.—This is an appeal from a judgment of the Chief Justice of the East Africa Protectorate dismissing an action brought by the Appellants "on behalf of themselves personally and on behalf of the Masai of Laikipia and on behalf of the Masai tribe generally."

The action was in substance one for damages for breach of an Agreement made in 1904 between the Government of East Africa and the Masai tribe, and in respect of stock illegally removed by the said Government and by the 20th and 21st Defendants under orders of the said Government; for a declaration of certain rights under the Agreement; and, for injunctions against the Attorney General, as representing the Government, and the 20th and 21st Defendants. Certain other Defendants were sued merely as signatories to the Agreement.

The action was dismissed on the grounds that the Agreement of 1904 and a subsequent Agreement of 1911 were treaties, and that any acts done in removing the Masai and their stock had been done in carrying out such treaties, and that both the treaties and the acts of the Defendants were acts of State which are not cognizable by a Municipal Court.

The following are the grounds of appeal :—

1. The learned Chief Justice erred in holding that the case was not cognizable in the Courts of the Protectorate.

2. The learned Chief Justice erred in holding that protected native subjects of the Protectorate have no rights against the Protectorate Government.

3. The learned Chief Justice erred in relying without proof on statements in the Written Statement of the Defendants, and in failing to take evidence as to the alleged acts of State, and as to the status of the Masai in fact in view of the extent to which they are governed directly by the Protectorate administration, and in failing to take judicial notice of the Protectorate legislation applied to the Masai, and of the practice of the High Court and the Courts subordinate thereto in exercising jurisdiction over the Masai.

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4. The learned Chief Justice erred in holding that the Agreements of 1904 and 1911 were acts of State and not under the jurisdiction of the Courts of the Protectorate.

5. The learned Chief Justice erred in holding that the Plaintiffs acquired no rights enforceable in the Courts of the Protectorate either against the Government or third parties under the Agreement of 1904.

6. The learned Chief Justice erred in holding that the Secretary of State for the Colonies can by an act of State infringe the individual rights of protected subjects in the East Africa Protectorate, and that the Courts of the Protectorate cannot interfere.

7. The learned Chief Justice erred in holding that the Masai and their chiefs are not under the original jurisdiction of the High Court of East Africa.

The question to be decided in this appeal is whether the case is cognizable by the Courts of the East Africa Protectorate.

The material portions of the Agreements of the 10th August, 1904, and the 26th April, 1911, as set out in the judgment under appeal are as follows:—

After reading the Agreements the learned Chief Justice proceeded as follows:—

In short, by the first Agreement the Masai were to vacate the Rift Valley and to occupy two settlements, one of which was the area known as Laikipia; they were to be allowed a right of way between the two areas; the Government was to establish and maintain a station on Laikipia; and officers known and trusted by the Masai were to be appointed to look after them there.

By the subsequent Agreement of 1911, the Masai were to occupy one area only; those who had occupied Laikipia or the Northern Masai Reserve were to move to the South of the railway to land immediately to the West of the land reserved to the other section of the tribe by the 1904 Agreement.

The Appellants contend that the Agreement of 1904 was a civil contract, ratified by the action of all the Masai, upon which they are entitled to sue, and that the Agreement of 1911 is also a civil contract which is only binding on the individual Masai who signed it, as it was not entered into by those who by the custom of the Masai were able to bind the tribe generally, and was not ratified by all the Masai.

For the Crown it is argued that both these Agreements are treaties and consequently acts of State which are not cognizable, and cannot be enforced, by the Courts of the Protectorate.

The Appellants in answer to this plea maintain that the Agreements are civil contracts and deny the right of the Crown to

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enter into a treaty with a tribe within the Protectorate which has come under its complete administration and with which no treaty has been entered into prior to the declaration of the Protectorate or the complete administration of the tribe by the Government.

They further contend that the Protectorate is a British dominion and that the Masai are British subjects or subjects of the Protectorate and that "act of State" cannot be pleaded against subjects.

In order to arrive at a conclusion as to whether a treaty can be made with the Masai it is necessary to consider the status of the Protectorate and of the Masai.

Although the East Africa Protectorate was in existence for some years before 1902, the East Africa Order in Council, 1902, as modified by subsequent Orders in Council, establishes the present system of government. The Order in Council begins with the following recital:—

"Whereas the territories of Africa suitable within the limits of this Order are under the protection of His Majesty the King, and are known as the East Africa Protectorate;

And whereas by treaty, grant, usage, sufferance and other lawful means, His Majesty has power and jurisdiction within the said territories;

Now therefore, His Majesty, by virtue and in exercise of the powers on this behalf by the Foreign Jurisdiction Act, 1890, or otherwise in His Majesty vested, is pleased, by and with the advice of His Privy Council to order, and it is hereby ordered, as follows":—

The Foreign Jurisdiction Act deals with the jurisdiction of His Majesty in foreign countries, that is to say, in countries or places outside His Majesty's dominions.

The Appellants call attention to the fact that by the above Order in Council a complete system of government, executive, legislative and judicial, is established and by Article 15 (1) full jurisdiction, civil and criminal, over all persons and over all matters in East Africa is vested in the High Court;

And, further, that by the East Africa Order in Council, 1906, also expressed to be made under the Foreign Jurisdiction Act, an executive and legislative council is established.

They argue from this that full British constitutional rule has been established in East Africa, that the acts of the executive have been made subject to the legislature and that the power of His Majesty is exercisable only in accordance with law and that no arbitrary rights are left; in fact, that there is no distinction between the Protectorate and a Crown Colony, and consequently that East Africa is no longer a foreign country but is a British dominion.

I am unable to agree with this view.

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OL LE NJOGO and others v. ATTORNEY GENERAL and others. Court of Appeal 7 1913

Although no doubt the Government of the East Africa Protectorate is more fully organized than that of the Bechuanaland Protectorate in 1906 I can find no such difference between the two Protectorates as to warrant this Court in coming to a different conclusion upon the question whether the Protectorate is British dominion or a foreign country than that which was reached with regard to the Bechuanaland Protectorate by the Court of Appeal in the case of *Rex* v. *Crewe*, Ex-parte *Sekgome* (1). It was there held that the Protectorate was a foreign country in which His Majesty had jurisdiction within the meaning of the Foreign Jurisdiction Act, 1890.

In that case Vaughan Williams, L.J., said, "Generally, I may say, I am of opinion that it is impossible for us to say that at the date of the Order in Council of May 9th, 1891, the territory, the subject of that Order was not a foreign country, that is a country out of Her Majesty's dominions. The territory has not been annexed so as to become part of Her Majesty's territorial dominions. Bechuanaland Protectorate is under His Majesty's dominion in the sense of power and jurisdiction, but it is not under his dominion in the sense of territorial dominion."

And Kennedy, L.J., in the same case at page 623, stated ". . the Protectorate of a foreign country in which His Majesty has and exercises power and jurisdiction as a protecting and not as a ruling Sovereign, and which he has never annexed to the possessions of the British Crown, certainly cannot properly be treated as part of His Majesty's dominions." The learned Lord Justice arrived at the conclusion that the Bechuanaland Protectorate, including Gaberones, formed no part of His Majesty's dominions in spite of the fact that chiefs of the local tribes had in 1904 "abandoned all rights and jurisdiction in and over" a portion of the Protectorate within which Gaberones lay and that in that Protectorate "every branch of such Government as exists—administrative, executive and judicial—has been created and is maintained by Great Britain."

As in Bechuanaland so in East Africa there has been no formal annexation of the territory and as stated by Lord Halsbury in the course of the argument in *Staples* v. *The Queen* (2), which was a case governed by the Foreign Jurisdiction Act, 1890, "I never heard that you can force a Sovereign to take territory."

It is true Vaughan Williams, L.J., at page 607 in the case already cited, states, "I recognize that a country which originally was a foreign country outside the territorial dominions of the Crown might in course of time become a part of the territorial dominions of the Crown, and this by the acts of the Crown without any formal act of annexation," but he held that such had not been the case in

(1) Supra. (2) P.C. unreported.

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Bechuanaland, and one of his reasons for arriving at this conclusion may be gathered from an earlier passage in his judgment at page 606 in which he assumes that "no Act of the Crown has since the creation of the Protectorate constituted a grant to the inhabitants of a constitution."

This passage has been quoted by the Appellants as being in favour of their contention that East Africa has become annexed to the dominions of the Crown, because they argue that the Order in Council of 1906 provides East Africa with a constitution.

But it is clear from the continuation of the passage quoted that the learned Lord Justice referred to a constitution of which the Crown could not in any event deprive the country, for he adds, "I assume this, because, although the grant to a ceded or conquered country of a complete system of laws may constitute an irrevocable grant of a constitution, yet there is no such grant in this case, because the Order in Council which provided a system of laws made that provision on the express condition that His Majesty might disallow wholly or in part any proclamation."

A similar power of disallowance exists with regard to East Africa; further, a power is retained of legislating for East Africa from Downing Street; and, finally, the Order in Council which constitutes the alleged grant of a constitution expressly provides in Article XIX. that His Majesty, His heirs and successors in Council may at any time revoke the Order itself; a provision which clearly enables the Crown to revoke the grant of any constitution granted by such Order.

It has not been argued before us that East Africa has been acquired by settlement by His Majesty, nor has the Court been asked to take any evidence upon this point.

All Orders in Council hitherto promulgated, including one so late as 1911, have been expressed to be under "The Foreign Jurisdiction Act, 1890, or otherwise" the clear inference being that His Majesty in Council still considers the Protectorate a foreign country and so treats it. Even if it be competent to the Court to go behind this fact and find that some other acts of the Crown have amounted to annexation, as stated above, I am unable to find that such acts exist and am of opinion that the East Africa Protectorate has not become part of the British dominions but is still a foreign country.

The status of the Masai now has to be considered, and this from two points of view: first, are the Masai British subjects, or British East Africa subjects; secondly, are the Masai a people with whom a treaty can be made?

As regards the first point it would seem that if East Africa, which includes the land of the Masai, is technically a foreign country, a native inhabitant of that country would also be technically a foreigner in relation to the protecting State.

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Counsel for the Appellants has argued that the application of the Indian Penal Code which provides *inter alia* for the punishment of persons waging war against the King and the enactment of The Petitions of Right Ordinance, 1910, have a material bearing upon this point. I do not consider however that this can be the case, as these provisions of the law apply to every person in the Protectorate, whether he be a subject or a foreigner.

I can see no such difference between the position of a Masai and that of Sekgome, who was considered by both Vaughan Williams, L.J. (at page 607), and Kennedy, L.J. (at page 619), not to be a British subject, as to justify me in holding that the Masai are British subjects, nor do I know of any such person as a "British East Africa subject" or of any machinery by which a foreigner may obtain such a status. In my opinion the Masai are the subjects of their chiefs or their local government, whatever form that government may in fact take.

If the Masai are not British subjects are they in their collective capacity as a tribe persons with whom a treaty can be made?

In the course of the arguments before this Court it was admitted by the Appellants on the one hand that the Masai were a people with whom a treaty could have been made twenty or thirty years ago, and on the other hand by the Respondents that the Masai in 1904, at the date of the conclusion of the first Agreement, had come under the administration of the Government, by which I understand that they were within a part of the Protectorate in which Government officials were exercising administrative questions and in which the jurisdiction of the High Court was exercised over the natives, at any rate in cases arising between members of the tribe and non-natives.

In addition to these admissions we considered it expedient to have upon the record such facts bearing upon the status of the Masai as are well known and uncontested. Both parties thereupon admitted the approximate accuracy of certain statements contained in Sir Charles Eliot's introduction to a work by Mr. A. C. Hollis entitled "The Masai," and in the memorandum on the Masai contained in serial No. 17 of the White Paper "Correspondence relating to the Masai, June, 1911," and they further admitted that since 1904 the Masai had increased in population and wealth and that the result of a rough census in 1913 was to place the population at 30,000.

From these admissions it appears that the Masai are a large nomad tribe of pastoralists and warriors who have in the past proved a terror and scourge to the surrounding peoples. Their social system is based on military ideals and their raids in the past extended from Lake Victoria to the Coast and from Mount Kenya to the middle of German East Africa. The last raiding expedition on a large scale is

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said to have taken place as late as 1898 and in 1902–3, when settlers were first attracted to East Africa in considerable numbers, the Masai still roamed unmolested on both sides of the Uganda Railway from Molo to Naivaska, and on the South side from Nairobi to Kiu.

Their power declined in the early nineties owing to rinderpest, famine, small-pox and civil war, but their numbers and wealth have recently been on the increase.

The civil dissensions came to an end in 1908, since when the Masai have been more or less united and have followed the advice of the Laibon or head medicine man of the tribe.

It may, I think, therefore be assumed without question that the Masai continue to possess an entity of their own as a tribe, and that moreover they are a military people who could put a force of some thousands of spearmen into the field.

There can be no doubt that as admitted by the Appellants the Crown could have come to an agreement in the nature of a treaty with the Masai before the declaration of the Protectorate. It consequently only remains to decide whether anything has since occurred to preclude the Crown from so acting.

A declaration of a Protectorate in itself has no such effect, as in theory such a declaration presupposes the existence of both a protecting and protected states and the continuance in the latter of some elements of sovereignty.

The Appellants admit that a treaty could still be made with a tribe in the Protectorate which has not yet come under administration, if any such tribe still exist within its borders, but they argue that when a protected state has come under the administration of the protecting state in the way that the Masai have done all vestiges of sovereignty in them cease to exist. They owe obedience to the laws and to the administration and are amenable to the Courts of Justice of the protecting state—in fact they do not exercise the three elements of which sovereignty is composed.

There is much force in this argument, but I am not satisfied that it is correct.

Treaties are the subject of international law which is a body of rules applied to the intercourse between civilised states, and it is said by Mr. Hall, at page 126 of the 8th edition of his work on international law, that "International law touches Protectorates of this kind (Protectorates over uncivilised and semi-civilised peoples) . . . . . by one side only. The protected states or communities are not subject to a law of which they never heard, their relations to the protecting state are not therefore determined by International law."

If this be correct it would seem that an agreement between a civilised State and an uncivilised community is not governed by

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International law. It must, however, I think, be taken to be governed by some rules analogous to International law and to have similar force and effect to that held by a treaty, and must be regarded by Municipal Courts in a similar manner.

The declaration of a Protectorate over an uncivilised region is deemed by Mr. Hall and Mr. Westlake to carry with it the obligation of establishing the authority mentioned in Article 35 of The Berlin Act. The method of establishing that authority and the extent to which the protecting State goes in that direction must vary in different cases, but the establishment of Courts to which a foreigner can resort for justice against the native is an essential element in the establishment of such authority.

Some exercise by the protecting state of all the three elements of sovereignty must, I take it, be necessary in uncivilised countries where no machinery for their exercise exists otherwise; further, however far that exercise goes, until annexation takes place the territorial sovereignty must be taken to be in suspense or it, or some part of it, must be taken to remain in the native authorities.

As Mr. Westlake observes at page 184 of his "International Law": "Until there is annexation, formal or otherwise, a protectorate is a foreign country, and the rights held over it are still distinguished from territorial sovereignty by however thin a line."

If, as would appear to be the case in India, as hereinafter mentioned, sovereignty can still be retained by a State which cedes by treaty part of its territory with full jurisdiction in that part, there would seem to be no difficulty in holding that, where an exercise by a protecting State of the three elements of sovereignty takes place by sufferance: (1), that exercise should not be deemed to carry with it more of the sovereignty than is necessary; (2), it is competent to the protecting State to permit some vestige of sovereignty to remain in the native authority; and (3), the protecting State must be taken to have permitted this, unless and until it has assumed full sovereignty by annexation.

In India it would seem that where a British railway passes through a Native State agreements have been made by which the State cedes the land in perpetuity to the British Government with full civil and criminal jurisdiction. Sometimes the grant is stated to be with full sovereignty, sometimes there is an express reservation of sovereignty. ("The Criminal Law of India," Maine, 3rd edition, page 280.)

All the Indian cases which have been quoted to us, in my opinion, show that where an individual holds his office or territory by way of grant from a sovereign power an agreement made with him is a civil contract, but that where the individual is regarded as holding such office or territory as a sovereign an agreement made between

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him and a sovereign power is a treaty. In some of the cases the amount of sovereignty remaining is exceedingly small and the position occupied is one which comes very near to complete dependence.

During the course of the argument with regard to treaties or agreements I took occasion to refer to the agreements with native chiefs in Uganda, another protectorate under the appellate jurisdiction of this Court (in which there is an Order in Council similar to the East Africa Order of 1902, though there is no executive or legislative council), and to state that the jurisdiction of the High Court in Uganda is regarded as subject to these agreements or treaties.

If reference be made to one of these agreements—concluded seven years after the declaration of the Protectorate—the Ankole Agreement, 1901, it will be found that it was executed in the presence of the Sub-Commissioner of the Western Province and the Collector of Ankole, both officers in charge of the administration of the Ankole tribe. ("The Laws of the Uganda Protectorate," 1910, page 1,005.)

No record of any other agreement or treaty with Ankole appears in Hertslet's "The Map of Africa by Treaty," and so far as I am aware no agreement had ever been previously concluded between the Crown and the Ankole tribe; it is thus clear that in practice the making of a treaty with a tribe which is under the active administration of the government of a Protectorate is no new thing even where no treaty has been entered into with it before it was brought under administration.

For the above reasons I consider that the Masai are still a tribe with which it is competent to the Government to make a treaty if it elects to do so.

In this connection it is further to be noted that concurrent jurisdiction by the Masai over native cases was recognized by Section 46 of the Native Courts Regulations, 1897, and these regulations remained in force till 1907, when they were repealed by The Courts Ordinance, 1907, which, however, provided in Section 10 that nothing in the Ordinance should affect the power of the Governor to recognize the jurisdiction of tribal chiefs. It is at least arguable that this is a recognition of a jurisdiction pre-existent to and apart from jurisdiction conferred by the Order in Council, and is a remnant of sovereignty still remaining in the Masai; if this be so a further reason is furnished for considering that a treaty might be made with the Masai.

The power of making a treaty with the Masai being recognized it remains to consider whether the agreements are in fact treaties or are merely civil contracts.

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In my opinion they are in the nature of treaties; I am unable to agree with the argument that they are merely contracts with regard to land which could have been made under The Crown Lands Ordinance, 1902; clearly they are not made under that Ordinance and I can find no section in the Ordinance under which they could appropriately be made. Further, I am unaware of any provision of law which would authorize certain members of a tribe to enter into a civil contract which would bind all the members, unless such members form a central authority in the nature of a government, in which it may be presumed some elements of sovereignty would exist. Such a position is obviously inconsistent with the contention of the Appellants.

On the assumption that no such element of sovereignty exists, it has been argued that the first agreement has been ratified by all the Masai because they have all acted upon it; the Appellants would find it impossible to prove that each and every Masai had acted upon the agreement, and it would seem that if any Masai has not acted upon it it could not be held to be binding upon the tribe generally. Further, even if all the Masai had acted upon it the question of their right to bind all those who are not *sui juris* would remain to be considered.

The agreements have not the appearance of being mere contracts relating to land. The first agreement *inter alia* provides for the establishment and maintenance of a Government station and the appointment of officers to look after the Masai; an arrangement in other words for the government and administration of the country. It is moreover to be observed that the documents would not seem to have been regarded as civil contracts by the parties; that the Crown considers them as treaties is clear from the pleadings; the Appellants also described the first document as a treaty in their concise statement. It would further appear that no stamp duty has been paid upon either agreement yet; if the agreements were civil contracts they would *prima facie* operate as exchanges, in which case under the Stamp Act duty is payable by the parties in equal shares in the absence of any agreement to the contrary (Section 29 of The Indian Stamp Act).

If the agreements are treaties I am of opinion that the Court cannot go into the question of whether the Government has selected the right persons with whom to take such treaties. I may, however, add that in my opinion such an Ordinance as The Village Headmen Ordinance, which deals with the appointment of headmen for villages, has not the effect which the Appellants attach to it, of precluding the Government from recognizing persons as chiefs of a tribe.

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Further, it is not within the province of the Court to enquire whether a treaty has been obtained by duress; a circumstance which is so frequently present at the conclusion of a treaty.

The Appellants contend that the Petitions of Right Ordinance, 1910, precludes the Government from pleading that the petitioner is a protected foreigner and that the act complained of is an act of State.

The material section of the Ordinance reads as follows:—

"3. All claims against the general Government of the Protectorate, being of the same nature as claims which may be preferred against the Crown in England by petition, manifestation or plea of right, may, with the consent of the Governor, be preferred in the High Court in a suit instituted by the claimant as Plaintiff against the Crown Advocate as Defendant, or such other officer as the Governor may, from time to time, designate for that purpose."

The Ordinance is entitled "An Ordinance to make provision relating to suits by and against the Government and to the costs thereof." It is clearly an Ordinance designed to alter the procedure existing in the Protectorate by virtue of the application of the Indian Civil Procedure Code. It is open to doubt whether it was intended to effect or did effect any alteration in the substantive law of the Protectorate, which, so far as it related to actions against the Government, was governed by the common and statute law of England at the commencement of the East Africa Order in Council, 1897, subject to any treaties for the time being in force relating to the Protectorate (Article 11 (a) of The East Africa Order in Council, 1897, as saved by Article 28 (1) of The East Africa Order in Council, 1902).

Petitions of right, however, do not apply to torts, and whatever may be the effect of the Ordinance as regards the plea of act of State in matters coming under the Ordinance, it would seem extremely doubtful whether it could be held to have any effect as regards the plea of act of State in respect of a tortious act committed by a servant of the Crown.

But it does not appear to me to be necessary for the point to be decided in this case, as in any event the Ordinance cannot be held to prevent the Crown from making a treaty which it could otherwise make, and it is clear no action is maintainable in a Municipal Court to enforce the performance of a treaty as against one of the contracting powers. I therefore consider that the judgment of the Lower Court is correct in so far as it dismisses that part of the suit which is a claim in respect of the 1904 Agreement.

In so far as the suit is a claim against the Government in respect of tortious acts, it is clear that the Appellants cannot succeed; a claim

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of such a nature is not permitted by the law of England, which applies in this respect to East Africa.

As to the Defendants 20 and 21 it is admitted that anything done by them was done by them as agents of the Government acting in pursuance of orders. It also appears to have been done by them for the purpose of carrying out the Agreement of 1911.

In my opinion an action will not lie against these Defendants for doing these acts which are acts of State and not cognizable by the Court as being committed in a foreign country against foreigners who belong to the tribe with whom the treaty was made.

The case of *The Secretary of State for India* v. *Kamachee Boye Sahaba* (1) shows that where an act injurious to a foreigner, and which might otherwise afford a ground of action, is done by the orders of Government in a foreign country it is an act of State, and exempts from all liability the person who commits the trespass; and the case of *Buron* v. *Denman* (2) is authority to the same effect.

I do not consider it necessary to deal with the grounds of appeal seriatim, but desire to state with regard to the second and seventh grounds that I do not find that the Chief Justice of the East Africa Protectorate has found that protected native subjects have no rights against the Protectorate Government, or that the Masai and their chiefs are not under the original jurisdiction of the High Court.

All that was decided was that treaties had been made with the Masai, and that they could not be enforced by Municipal Courts, and that acts done by officers of the Government in carrying out these treaties were acts of State and not cognizable by the Courts.

It is clear that the Masai as a whole are subject to the original jurisdiction of the High Court. It might possibly, however, be arguable that if there were a sovereign ruler of the Masai he might claim to be exempt from the jurisdiction. On the other hand it might be contended that he has acquiesced in the jurisdiction of the High Court being exercised over all the Masai including himself; the point, however, is not now before the Court.

Although I cannot agree that the learned Chief Justice has held that protected native subjects of the Protectorate have no rights against the Protectorate Government, yet if the law as laid down in the case of *Buron* v. *Denman* applies in its entirety to acts committed in East Africa against a native of the Protectorate, it would seem that a native has no rights which he can enforce in a Court of law in respect of any kind of tortious act committed upon the orders of or subsequently ratified by the Government; he has no remedy against the Crown in tort, and if he brings an action against an individual the latter can plead orders of the Government, whereupon the act becomes an act of the Government, and one for which the only

(1) Supra. (2) Supra.

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remedy is an appeal to the consideration of the Government; the other remedies of diplomacy and war which might be available to a foreigner, the subject of an independent state, not being available to a native of the Protectorate.

In this connection I will again quote the words of Vaughan Williams, L.J., in the case of *Rex* v. *Earl of Crewe* (1) : "The idea that there may be an established system of law to which a man owes obedience, and that at any moment he may be deprived of the protection of that law, is an idea not easily accepted by English lawyers. It is made less difficult if one remembers that the Protectorate is over a country in which a few dominant civilised men have to control a great multitude of the semi-barbarous."

While I have felt it right to deal with this matter in connection with the second ground of appeal, it is to be observed as regards the case now before the Court that the Appellants' counsel has admitted that everything which has been done in moving the Masai could have been effected by legislation, in which event the Masai could have had no recourse to the Courts.

If in the interests of peace and good government it was considered necessary that the Masai should be moved, it was a natural and politic course for the Government to come to an agreement with them with this object in view.

Conferences took place between certain of their chiefs and the Government at which the subjects were discussed, and, as a result, treaties were concluded between the parties.

The interests of the tribe were in my opinion as likely to receive adequate consideration at such conferences as they would have received in the course of a discussion at a legislative council at which the chiefs might not have been present.

On the grounds already stated I consider that the claim in this case is not cognizable by the Courts and that the appeal should be dismissed with costs.

BONHAM-CARTER, J.—I agree.

It is necessary to arrive at the true status of the East African Protectorate, the individual Masai and the Masai tribe.

The root of the government of the East Africa Protectorate lies originally in the Foreign Jurisdiction Act, 1890, and then in the Order in Council, 1902. The High Court of East Africa was established under this Order, and this Appeal Court was established under an Order in Council enacted under cover of the Foreign Jurisdiction Act. The Foreign Jurisdiction Act has no power except in Foreign Countries, and the Orders in Council under cover of that Act can only apply in Foreign Countries.

(1) Supra.

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This Court cannot of its own act deny its own root of title, and therefore it is bound to hold that the East Africa Protectorate is a Foreign Country.

It has been argued by Counsel for the Appellant that the East Africa Protectorate is not a Protectorate but a British Dominion, in that since the protecting Government has assumed that whole of the bundle of powers that make up Sovereignty the State of a Protectorate cannot exist.

It was held in *R.* v. *Crewe* (*Earl*) (a) that the Bechuanaland Protectorate was a Protectorate. Kennedy, L.J., stated :—

> "In the Bechuanaland Protectorate every branch of such government as exists—administrative, executive and judicial—has been created and is maintained by Great Britain. What the idea of a Protectorate excludes, and the idea of Annexation on the other hand would include, is that absolute ownership which was signified by the word 'dominium' in Roman Law, and which, though perhaps not quite satisfactorily, is sometimes described as territorial sovereignty. The protected country remains in regard to the Protecting State a Foreign Country; and this being so, the inhabitants of a Protectorate, whether native born or immigrant settlers, do not by virtue of the relationship between the protecting and protected State become subjects of the protecting State."

In the same case L. J. Vaughan Williams held :

> "Bechuanaland is under His Majesty's dominion in the sense of power and jurisdiction, but is not under his dominion in the sense of territorial dominion—and generally I think that the Foreign Jurisdiction Act, 1890, and the proclamations thereunder are in respect of the Bechuanaland Protectorate to give His Majesty Absolute Power, subject to the provisions of any Act of Parliament, to say from time to time what law should be applied in these territories outside His Majesty's dominions, just as if the territory had been the subject of absolute conquest, since in my opinion there has been no Annexation and no Constitution has been granted."

By all the Orders in Council up to the present date this Protectorate has been treated as a Foreign Country and I am unaware of any Act amounting either to Annexation or Conquest. Such Acts cannot be presumed. Lord Halsbury in *Staples* v. *The Queen* (1) laid down this in the following words :—

(1) P.C. unreported, 27th January, 1899.

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"I never heard that you can force a sovereign to take territory."

It is clear to my mind that the East African Protectorate is not British dominion but is a Foreign Country.

As to the personal status of an individual Masai I find it to be so similar to that of Sekgome in *R.* v. *Crewe* (*Earl*), that I am unable to distinguish between them and in that case L.JJ. Vaughan Williams and Kennedy clearly held that Sekgome was not a British subject. The facts in the cases are so similar that I do not consider it necessary to quote any further authority for deciding that a Masai is not a British subject.

There is now the status of the Masai tribe. The constitution of the Masai tribe is not one familiar to European ideas and was not a very rigid one, and owing to the nomad and truculent nature of the race the central authority had not a very great power; the main power rested with the warriors, who gave utterance to their wishes through their elected chiefs. There was also an individual called Laibon (Ol-oiboni) whose office was hereditary and who had great power over the whole of the Masai owing to his supposed supernatural powers. The Laibon ruled more as a spiritual than a temporal chief.

Whatever the interior economy of the Masai was they were the *de facto* rulers and occupiers of a large tract of country and were sovereign over all the tracts of land included in the documents of this case.

It is not denied that thirty years ago the British Government could have entered into a treaty with the Masai tribe, and if it had so entered, no question could have arisen in the Municipal Courts as to the right of the British Government to select the signatory to the Treaty.

In later times the Protectorate Government has completely administered the Masai tribe and the Masai are entirely under the jurisdiction of the Protectorate Courts.

The Masai tribe has never been abolished nor ceased to exist as a tribe. The "dominion" which has not vested in the Protectorate Government remains with the Masai.

The Masai must be held to be a protected state having "dominion."

The Appellants claim that the two documents in the case are civil agreements; the Respondents that they are treaties.

The first document is dated 10th August, 1904; the second 26th April, 1911.

The object of the first document was expressed to be to remove the Masai into definite reservations away from the railway line, and away from any land that may be thrown open to European settlement.

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This object was purported to be effected by the Masai agreeing to vacate the Rift Valley and retire into two reserves, one north of the line, called Laikipia, or the Northern Masai Reserve, and the other south of the line, called the Southern Masai Reserve. A road of communication was reserved between the two districts.

The object of the second document was expressed to be to reunite the Masai tribe and this object was purported to be effected by the Masai of the Northern Reserve, or Laikipia, agreeing to vacate Laikipia and occupy a reserve south of the railway line and directly east of the original Southern Masai Reserve.

The document of August 10th, 1904, was entered into between "the Lybon and chiefs (representatives) of the existing clans and sections of the Masai tribes" and Sir Donald Stewart, His Majesty's Commissioner for the East Africa Protectorate, and was approved by the Secretary of State.

As I have already found the Masai to be a protected state I am of opinion that this document is a treaty between the Protecting and Protected States, and the Municipal Courts have no power to enquire as to the authority of the signatories.

The document of 26th April, 1911, was entered into by "The "Paramount Chief of all the Masai and his regents and the "representatives of that portion of the Masai tribe living in the "Northern Masai Reserve" and "Sir Edouard Percy Cranwill "Girouard on behalf of His Majesty's Government"—this document appears to me to be equally a treaty with the document of 10th August, 1904.

The Municipal Courts have neither power to enquire into the validity of these documents, nor into the authority of the signatories.

These two documents are treaties and acts of State.

It has been further contended that even if the two documents are treaties this does not entitle the Crown to act otherwise than by the legislature in compelling the Masai to act under them and *Walker* v. *Baird* (1) has been quoted as an authority. In that case the Plaintiff was a British subject and it was held that the Crown has no right to compel its own subjects otherwise than by legislature. There is, however, the case of *Buron* v. *Denman* (2). Captain Denman, of H.M. Navy, seized and destroyed certain barracoons of the Plaintiff, a Spaniard, on the West Coast of Africa. The action was not to be justified by any law or treaty, but was subsequently approved by the Crown and it was held that it was a wrong no longer actionable. This principle was apparently extended in Scotland in the case of *Poll* v. *L. A.* (3). Following *Buron* v. *Denman* I am of opinion that the Municipal Courts have an authority to

(1) Supra. (2) Supra. (3) 1899 Fraser, 823.

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interfere with the actions of the Crown done under the treaties with relation to a Masai, that is to say a foreigner.

The treaties are not contracts enforceable in Municipal Courts, and therefore any action that lies must be in tort, and no action lies against the Crown in tort even by Petition of Right, *Feather* v. *The Queen* (1). No action in this case lies therefore against the first Defendant. The 2–19 Defendants are only sued as signatories to a treaty, and therefore no action lies against them by Appellants.

The Appellants plead that the 20th and 21st Defendants are acting under orders from the Crown and therefore following *Buron* v. *Denman* no action lies against them.

KING FARLOW, J.—This is an appeal from a decision of the Chief Justice of the East Africa Protectorate, upon a preliminary objection by the Respondents that the action out of which the appeal arises is not within the cognizance of the Court.

The suit is based upon two written agreements, one of 1904, and the other of 1911, between the Government of the East Africa Protectorate and the Masai tribe, and breach of contract on the part of the Government is alleged.

A claim in tort is also brought against the Government and against two officers thereof, referred to on the record as the 20th and 21st Defendants, in respect of wrongful acts alleged to have been done by them while carrying out the Agreement of 1911.

Certain other Defendants, Nos. 2 to 19, appear upon the record; but they are joined merely as signatories on behalf of the Masai to the Agreement of 1911.

The plea of the Respondents is one in bar and has been properly raised, *Musgrave* v. *Pulido*) (2).

The substantial question to be decided appears to be: Were these agreements in fact treaties, and as such not cognizable by the Courts of the Protectorate?

I am of opinion that upon this preliminary objection it is for the Court to inquire into the circumstances in which these agreements were entered into and into the nature of the agreements themselves. Also into the position and character of the parties, particularly of the Appellants, who have been permitted by the Court to sue on behalf of the Masai tribe generally, and are proceeding against the Government of the East Africa Protectorate with the fiat of the Governor of the Protectorate under the Petitions of Right Ordinance, 1910.

I also think the constitution and jurisdiction of the Courts of the Protectorate should be considered. I will deal with this first, as

(1) Supra. (2) L.R. 5 App. Ca. 102.

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it involves reference at some length to statutes and Orders in Council which appear relevant to the general enquiry.

The Court before which this suit was brought was established by the East Africa Order in Council, 1902, in accordance with the provisions of the Foreign Jurisdiction Act, 1890. This statute recites: "Whereas by treaty capitulation grant usage sufferance and other lawful means Her Majesty the Queen has jurisdiction within divers foreign countries and it is expedient to consolidate the Acts relating to the exercise of Her Majesty's jurisdiction out of her dominions;" and proceeds to enact by Section 1 that "It is and shall be lawful for Her Majesty the Queen to hold, exercise and enjoy any jurisdiction which Her Majesty now has or may at any time hereafter have within a foreign country in the same and as ample a manner as if Her Majesty had acquired that jurisdiction by the cession or conquest of territory."

Section 10 gives power to revoke or amend any Orders in Council made in pursuance of this Act, and Section 11 provides for the laying before Parliament of Orders in Council which thereupon shall have effect as if enacted in this Act.

In Section 16 the expression "foreign country" is defined as "any country or place out of Her Majesty's dominions."

The expression "British Court in a foreign country" means any British Court having jurisdiction out of Her Majesty's dominions in pursuance of an Order in Council whether made under any Act or otherwise. The expression "jurisdiction" means power.

I do not think that this Act, despite the language of certain sections, can be held to contemplate jurisdiction over British subjects alone, and not over the native inhabitants of a "country out of Her Majesty's dominions." I adopt the view expressed by L.JJ. Vaughan Williams and Kennedy in *Rex* v. *The Earl of Crewe*: *Sekgome*, ex parte (1) and by Professor Westlake, in Chap. IX. of his work on "International Law," in this connection.

The East Africa Order in Council, 1902, recites that "Whereas the territories of Africa situate within the limits of this Order are under the protection of His Majesty the King and are known as the East Africa Protectorate; And whereas by treaty grant usage sufferance and other lawful means, His Majesty has power and jurisdiction within the said territories.

"Now, therefore, His Majesty, by virtue and in exercise of the powers on this behalf by the Foreign Jurisdiction Act, 1890, or otherwise in His Majesty vested, is pleased by and with the advice of the Privy Council to order." Article 1 defines the territories within the limits of the Order and provides that "If His Majesty is pleased to direct that any other territories, for the time being under the

(1) Supra.

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protection of His Majesty, shall form part of the East Africa Protectorate, those territories shall, from and after a date to be fixed by an order of the Secretary of State, be deemed to be within the limits of this Order.

"In like manner, if His Majesty is pleased to direct that any territories for the time being forming part of the East Africa Protectorate shall cease to form part thereof, those territories shall, from and after a date to be fixed by an order of the Secretary of State, cease to be within the limits of this Order."

Article 12 provides for legislation by Ordinance by the Commissioner for the administration of justice, and generally for the peace, order and good government of all persons in East Africa, subject however to the power of the Secretary of State to disallow any Ordinance wholly or in part.

Article 15 (1) provides "that there shall be a Court of Record styled 'His Majesty's High Court of East Africa' . . . . . with full jurisdiction, civil and criminal, over all persons and over all matters in East Africa, and Section (2) provides in what manner such civil and criminal jurisdiction shall be exercised."

Article 18 provides that Courts subordinate to the High Court, and Courts of special jurisdiction, may be constituted by or under the provisions of any Ordinance as occasion requires.

Article 7 provides for the vesting in and exercise by the Commissioner appointed in accordance with Section 4 under the Sign Manual and signet of His Majesty of all rights of His Majesty in respect of any Crown Lands, which are defined as "all public lands in East Africa which are subject to the control of His Majesty by virtue of any Treaty convention or agreement, or of His Majesty's Protectorate, and all lands which have been acquired by His Majesty for public service or otherwise howsoever" and s. s. 4 of s. 7 declares that "all mines and minerals being in under or upon any lands in the occupation of any native tribe, or any members thereof . . . . . shall vest in the Commissioner . . . . . in like manner as the mines and minerals in under or upon any Crown Lands."

Article 28 repeals various Orders in Council including the East Africa Order in Council, 1897, subject to the following proviso (s. s. 1).

"Where other provision is not made by Ordinance any law practice or procedure established by or under the said repealed Orders . . . . . shall remain in force until such other provision is made."

The East Africa Order in Council, 1897, by Article 11 thereof provides that His Majesty's criminal and civil jurisdiction in the Protectorate shall be exercised "subject . . . . . to any Treaties

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for the time being in force relating to the Protectorate" and by Article 3 (X) "Treaty" includes any convention, agreement or arrangement with any state or government king chief people or tribe made by or on behalf of Her Majesty or to the benefits of which Her Majesty has succeeded.

This "practice or procedure" therefore of the exercise of jurisdiction by the Court subject to any such treaties would appear to have been preserved in the Order in Council, 1902.

By the Crown Lands Ordinance, 1902, provision is made concerning "conveyance, leases, and licences for the temporary occupation of Crown Lands."

By the East Africa Order in Council, 1906, provision is made for the appointment of a Governor in place of a Commissioner of the Protectorate and for the creation of an Executive Council and also a Legislative Council in and for the Protectorate.

By Article VIII. the Legislative Council is empowered to establish such ordinances and to constitute such Courts and Officers and to make such provisions and regulations for the proceedings in such Courts, and for the administration of justice, as may be necessary for the peace, order and good government of the Protectorate.

By Article IX. not only is power reserved to the Crown to disallow any such Ordinances, but also to make through the Privy Council all such laws and Ordinances as may appear necessary for the peace, order and good government of the Protectorate.

By Article XI. the Governor is empowered to make grants of any lands within the Protectorate which may be lawfully granted or disposed of by His Majesty, in conformity with Orders in Council or with instructions addressed to him, "under His Majesty's Sign Manual and signet or through one of His Majesty's Principal Secretaries of State."

By Article XIX. power is reserved to the Crown to revoke alter or amend the Order itself.

By the Courts Ordinance, 1907, Courts are constituted subordinate to the High Court. Section 10 provides (1) "Nothing herein shall affect the power of the Governor to recognize the jurisdiction of a Tribal Chief or Council of Elders . . . . . over the members of his or their tribe . . . . . or the exercise by such Tribal Chief or Council of Elders . . . . . of such authority as may be vested in him or them by the custom of his or their tribe or as may be granted to him or them by the Governor," and (2) "All jurisdiction granted by the Governor under the above sub-section shall be exercised in accordance with Rules made by the Governor."

Provision is also made for the enforcement of the orders of recognised Tribal Chiefs and Councils of Elders, and for the super-

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vision by Subordinate Courts of the procedure, orders and punishments of any Tribal Authority.

By Section 42 certain Ordinances and Regulations are repealed including the Native Courts Regulations, 1897, whereunder the concurrent jurisdiction, both civil and criminal, of various Tribal Chiefs in territories in the Protectorate outside the Mohammedan coast region had been recognized, including the Chiefs and Elders of the Masai in the Kenia district.

By the Village Headmen Ordinance, 1902 (of which Section 6 authorizing the hearing of native cases by Headmen is repealed by Section 42 of the Courts Ordinance, 1907, just referred to), provision is made for the appointment of any natives to be official Headmen of any village or group of villages.

A further Order in Council respecting the extent to which the law of England shall be in force in the Protectorate was issued as recently as 1911.

This Order, like all those preceding it, it is to be observed, is expressed to be made under the Foreign Jurisdiction Act, 1890, a statute which can only have application to a foreign country.

From this bare recital it is clear that the Government of the Protectorate of East Africa, which was established in 1893, has been provided with wide executive and legislative powers, including the control of certain lands and of all minerals, and with a complete system for the administration of justice with jurisdiction over all persons, including natives, and all matters in the Protectorate.

It has been contended by the applicants that what in substance amounts to a constitution has been granted to the country, that no arbitrary rights have been left in the Crown, and that its powers must be exercised in a particular way, *i.e.*, under Orders in Council and the Ordinances.

They maintain that the Masai are not now foreigners in the Protectorate Courts, whatever their status may be in the English Courts, and point out that their chiefs are under the jurisdiction of the Courts of the Protectorate. They admit that some 30 years ago the Masai were an alien tribe possessing sovereign rights, with whom the Crown could enter into a treaty which the Court could not question. At the present time, however, they say the sovereignty of the Crown in the Protectorate is complete, and just as the Masai were formerly subjects of their chief (Calvin's case), so they are now necessarily subjects of the Government of the Protectorate, if not actually British subjects.

It is admitted by the Respondents that the Masai were under administration by the Government at the date of the Agreement of 1904; and by the Appellants that the Crown would be at liberty to

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enter into a treaty with a tribe in the Protectorate which has not been brought under administration.

The Appellants maintain that the Government possesses ample powers to do what it pleases by legislative act, and that the claim by the Crown to exercise the prerogative of making treaties with the Masai in the circumstances of this case cannot be supported.

The Respondents admit that there is nothing to show that the Crown has ever surrendered its prerogative rights in the Protectorate, particularly that of recognizing sovereigns and making treaties with them. The Crown, they maintain, has not deprived itself of this inherent right, because it had chosen to provide for the exercise of other powers by the Government in a particular way.

The Masai, they say, are foreigners in a foreign country under the protection of the Crown, and the Crown is at liberty to select representative chiefs and others from among them, and to enter into treaties with them which are binding on the whole tribe.

If the Masai are British subjects the plea of the Respondents of treaty or act of State would appear to be of no avail. To this question I will refer later.

To arrive at a correct decision on these points the judgments of the Appeal Court in the case cited above of *Rex* v. *The Earl of Crewe* may be considered. In that case it was held that the Bechuanaland Protectorate was a foreign country, and that its native inhabitants were foreigners for reasons which appear to be applicable to the case of the East Africa Protectorate. Lord Justice Farwell, at page 611, in the course of his judgment points out, while speaking of the British Protectorate in Bechuanaland, that the country was, and is, territory inhabited by natives who vastly out-number the white population and proceeds: "There is no statutory definition of a Protectorate, nor has it received any judicial interpretation, but it is clear that, for the purposes of the Foreign Jurisdiction Acts, it means territory outside the dominions of the Crown, but over which the Crown exercises some jurisdiction."

Lord Justice Vaughan Williams, at page 603 in the course of his judgment, says: "The territory constituting the Protectorate of Bechuanaland had not been annexed so as to become part of Her Majesty's territorial dominions," and he adopts the statement of Lord Crewe that "the territory of Bechuanaland Protectorate is foreign territory under His Majesty's protection; it has never been acquired by settlement, or ceded to or conquered or annexed by His Majesty, or any of his Royal predecessors, recognized the same as, nor is it, part of his dominions, but he has power and jurisdiction within the same."

The learned Lord Justice had previously stated that provision had been made for a complete system for the administration of

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justice in the Protectorate. At page 606 of the report he goes on to say: "The . . . contention of the Crown is that the arrest and detention of Sekgome" (a native inhabitant of the Protectorate who was applying for a writ of habeas corpus to the Secretary of State for the Colonies) "are acts of State which cannot be questioned in the Law Courts. I am inclined to think that, assuming the Protectorate of Bechuanaland is a country which has never been annexed, this contention is well founded. I am assuming that no act of the Crown has, since the creation of the Protectorate, constituted a grant to the inhabitants of the Protectorate of a constitution; I assume this because, although the grant to a ceded or conquered country of a complete system of laws may constitute an irrevocable grant of a constitution, yet there is no such grant in the present case, because the Order in Council which provided a system of laws made that provision on the express condition that Her Majesty might disallow wholly or in part any proclamation."

He then proceeds to refer to the fact that the Bechuanaland Protectorate has never been acquired by settlement by His Majesty.

Substantially all the conditions referred to above appear to be present, as I have already indicated, in the Protectorate of East Africa, with similar consequences in law.

The judgment of Lord Justice Kennedy in the case I have been citing, at page 619 of the report, throws further light upon the question under consideration. After pointing out that the features of Protectorates vary greatly and that the one common element in Protectorate is the prohibition of all foreign relations except those permitted by the protecting State, he proceeds: "Within a Protectorate the degree and the extent of the exercise by the protecting State of those sovereign powers which Sir Henry Maine has described ('International Law,' page 58) as a bundle or collection of powers which may be separated one from another, may and in practice do vary considerably. In this Bechuanaland Protectorate every branch of such government as exists—administrative, executive and judicial—has been created and is maintained by Great Britain. What the idea of a Protectorate excludes, and the idea of annexation on the other hand would include, is that absolute ownership which was signified by the word 'dominium' in Roman Law, and which . . . is sometimes described as territorial sovereignty. The protected country remains in regard to the protecting State a foreign country; and, in this being so, the inhabitants of a Protectorate, whether native born or immigrant settlers, do not by virtue of the relationship between the protecting and the protected State become subjects of the protecting State. As Dr. Lushington said in regard to the inhabitants of the Ionian States, then under a

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British Protectorate, in his judgment in the *Ionian Ships* (1), 1855, allegiance in the proper sense of the term undoubtedly they do not owe; because allegiance exists only between the sovereign and his subjects, properly so called, which they are not. A limited obedience the dwellers within a Protectorate do owe, as a sort of equivalent for protection."

At a later stage in his judgment, on pages 622 and 623, the learned Lord Justice indicates that in his opinion the Bechuanaland Protectorate does not form part of "His Majesty's dominions" which he holds to mean "regions over and in which His Majesty has and exercises the whole collection or bundle of separate powers (to borrow the phraseology of Sir Henry Maine) which constitute territorial sovereignty"; and proceeds as follows—

"The Protectorate of a foreign country in which His Majesty has and exercises power and jurisdiction as a protecting and not as a ruling Sovereign, and which he has never annexed to the possessions of the British Crown, certainly cannot properly be treated as part of His Majesty's dominions."

In the case of the East Africa Protectorate there has been no annexation, and this in view of the observation of Lord Halsbury in *Staples* v. *The Queen* (2): "I never heard that you can force a Sovereign to take territory" cannot be assumed to have taken place merely because certain wide executive, administrative and judicial powers, revocable at the pleasure of the Crown, have been conferred on the Government of the Protectorate.

The words of Lord Justice Vaughan Williams, at p. 608 of the report of *Rex* v. *Earl of Crewe*, seem to apply with equal force to the East African Protectorate. "I do not find any evidence leading to the conclusion that the Bechuanaland Protectorate has ceased to be a foreign country outside the territorial dominions of the Crown."

I am unable to hold that "by the acts of the Crown without any formal act of annexation" that the East Africa Protectorate has become a part of the territorial dominions of the Crown, although British subjects may have permanently settled there to a considerable extent with the assent of the Crown. The revocable character of the so called constitution conferred upon the Protectorate and the power to legislate from Downing Street reserved by the Crown, seem a fatal objection to this contention.

That it has been acquired by settlement or conquest has not been argued. The power and jurisdiction exercised by His Majesty is that of a protecting and not of a ruling Sovereign.

As a protecting power in Africa, we are bound by solemn compact with other civilized nations, to establish and maintain a complete system of judicial administration in this Protectorate.

(1) 2 Ecc. and Adm., 226. (2) Supra.

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In these circumstances I hold the East African Protectorate to be a foreign country under His Majesty's protection and not part of "His Majesty's dominions," and that the Masai, as native inhabitants thereof, are not British subjects, or subjects of the East Africa Protectorate Government, as has been suggested, but foreigners under the protection of the British Crown.

I will next consider the position of the Masai as a tribe, and the question whether a treaty could be entered into with them as a tribe or otherwise by the Crown.

For the purposes of this appeal it is admitted that the Masai consist of a tribe roughly estimated by a recent census at about 30,000, and that they have long been one of the most important races of East Africa. They are savages of nomadic habits with a social system based on military ideals.

Certain ritual customs of a character peculiar to the tribe are observed by them, and they speak a common language. The ruling authority among the Masai is represented by their warrior class, with elected chiefs and a chief medicine man or Lybon acting as an advisory and semi-controlling force.

In the past they lived largely by raiding and by looting. The ravages extended over a wide area and were accompanied by much bloodshed and destruction of property.

Since about 1898 the Government of the Protectorate and the Masai have been on what may be regarded as friendly terms, largely owing to the control exercised over the tribesmen by their then Lybon, one Lenana, who may be regarded as a paramount chief.

Between 1902 and 1904 the Masai were wandering with their flocks and herds in the neighbourhood of the Uganda Railway, in districts to which white settlers were being attracted. They were also in the habit of occupying, in the course of their migrations, a tract of country known as the Rift Valley, which was well adapted for stock-raising.

It is true they were subject to the jurisdiction of the Protectorate Courts, and to the control of the administration, but in the absence of annexation and of an irrevocable constitution I am unable, as I have indicated above, to find that the Crown had acquired that absolute ownership or "dominium" over the territories of the Protectorate, including these important districts, which is necessary to create territorial sovereignty, and to convert its native inhabitants into subjects of the protecting State. They are still the subjects of their chiefs, even though the latter may be taken to have submitted to the jurisdiction of the Protectorate Courts.

A sufficient degree of sovereignty was in my opinion left in the Masai, a definite foreign people occupying an extensive and valuable area in a foreign protected country, to justify the Crown in holding

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OL LE NJOGO and others v. ATTORNEY GENERAL and others. Court of Appeal 7 1913

that a treaty could be entered into with them as a sovereign power, should such a course be thought desirable.

Circumstances pointed in this direction. It was obvious that the Masai, with their roving habits and warlike traditions, were not desirable neighbours for white settlers, and that their presence along the recently constructed railway was hardly consistent with the public interest.

In the result the Government entered into the agreement, referred to above as that of 1904, with the tribe.

The question arises:—Was this a treaty? or was it a civil contract enforceable at law?

A treaty is defined by Wharton as "a compact between nations" and a nation is defined as "a people distinguished from another people, generally by their language, origin or Government" or as "an assembly of men of free condition, as distinguished from slaves."

It is an act of State entered into between parties possessing sovereign rights, which can only be enforced by diplomatic representations, or in the last resort, by war.

Municipal Courts have no jurisdiction to enforce engagements between sovereign parties founded on treaties, *Raja Saligram* v. *The Secretary of State* (1).

It is clear that the degree of sovereignty which a party to a treaty must possess may be extremely limited; this is strongly borne out by some of the Indian cases which have been referred to in argument, *e.g.*, *Secretary of State for India* v. *K. B. Sahaba* (2).

It is also clear that the Crown in making a treaty can select or recognize such persons as it may think fit as representatives to bind the other high contracting party. I see nothing in the Village Headmen Ordinance, 1902, cited supra, to prevent the Government from selecting chiefs or other persons from among the Masai to represent the Masai people.

I am also of opinion that the Masai are a nation within the definition I have quoted above.

Was not this agreement in the circumstances an act done by the State in the Protectorate which was necessary for the public safety *or ne quid detrimenti res publica capiat?*

Lord Justice Farwell, in the course of his judgment in *Rex* v. *Earl of Crewe*, points out that when the State takes over the responsibility of a Protectorate over a territory inhabited by native tribes who largely out-number the white population, its first duty is to secure the safety of the latter.

I am of opinion that the Government in discharge of this duty was compelled to enter into this agreement as an act of high policy

(1) Supra. (2) Supra.

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or necessity, and were at liberty at their discretion to proceed by way of treaty in preference to legislation.

Moreover a treaty, preceded by adequate discussion of its details by the representatives of the tribe and of the Government, might well be regarded as an even more appropriate instrument in the circumstances than an Ordinance passed by a Legislative Council.

Looking at the document itself (Exhibit A. in the Appendix to the plaint) it is to be observed that it is signed by Lenana, Lybon of all the Masai, the Lybon of Naivasha, and the chiefs of the sections of the tribe occupying the districts I have referred to, and under it these sections agreed to remove "their people flocks and herds into definite reservations away from the railway line, and away from any land which may be thrown open to European settlement." These definite reservations were in what is known as the Laikipia district well to the north of the Uganda Railway line.

By the removal thither of the sections concerned the tribe would be split into two main divisions occupying two large areas of land at a considerable distance from each other.

The Appellants contend that this agreement was nothing more than a civil contract, *i.e.*, an arrangement concerning the tenure of land such as the Government might then have been making with, say, a Land Syndicate, partly British, partly foreign. In thus dealing with the Masai the Government, they say, purported to give and receive a legal title and intended that the Masai should acquire legal rights enforceable at law in the Laikipia area, and that the Government should acquire similar rights in the area taken from the Masai in exchange.

The document on the face of it appears to be different from an ordinary contract for the exchange or sale of land or interests therein or from such contracts with regard to land as are contemplated or provided for under the Crown Lands Ordinance, 1902, cited supra. It purports to bind all the members of the tribe inhabiting certain areas through the act of their chiefs, the signatories. If it were nothing more than a civil contract I fail to see how it could be held to bind all the members. The Appellants contend it was ratified by all the Masai because they acted upon it after the matter had been well considered by the tribe.

The proposition that they had one and all acted upon it would obviously be difficult of proof, apart from the position in law of infants and others not *sui juris* in such a case.

It deals with matters of Government administration "as a most important point in this arrangement." It bears no sort of stamp. In their "concise statement" the Appellants themselves describe it as a "treaty."

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I am of opinion that the document in question is in fact a treaty. Entering into it was an act of State, and that and the enforcement of its provisions are matters outside the jurisdiction of the Court.

I agree with the view expressed by the Respondents that it imposes moral obligations on both the contracting parties; these however are not cognisable in a Court of law.

I am equally of opinion that the Agreement of 1911 (Exhibit B. in the Appendix to the plaint) is a treaty with similar consequences attaching thereto so far as the jurisdiction of the Court is concerned. On the face of it it is a treaty between the Crown and "the Masai people," as represented by their chiefs, regents and heads of clans, for the uniting of the Masia in one reserve, south of the railway line, and for the addition of upwards of 3,000 square miles to the country already in their occupation to the south of the railway.

The allegation contained in the Plaint that the Government acted in an unfair or arbitrary manner towards the Appellants in connection with this treaty and the question of its validity cannot be considered by the Court.

Nor is there in my opinion anything in the contention of the Appellants that these agreements cannot be recognised as treaties, because they are not under the Great Seal in accordance with the Act of Union of England and Scotland, 6 Anne c. 11, art. XXIV.

This article is merely declaratory as to the manner in which the Great Seal of the United Kingdom is to be used after the Union and does not prescribe that the treaties shall not be made otherwise than thereunder. Nor does it invalidate treaties not so made. It is clear that a large number of treaties, particularly with native tribes and sovereign potentates in Africa, India and elsewhere have been entered into without this formality being observed, and have been recognised as binding upon the high contracting parties.

Further, a treaty is none the less a treaty because it is entered into with a tribe or community, which, by reason of their being uncivilised, may not be recognised as coming strictly within the Rules of International Law.

There remains to be considered the claim for damages against the Crown and the 20th and 21st Defendants on the record for alleged tortious acts in connection with the carrying out of the said treaties.

Inasmuch as it is settled law that the King can neither do nor authorise a wrong, I hold that the claim against the Government in tort cannot be sustained.

As to the 20th and 21st Defendants, it is admitted by the Appellants that the acts complained of were or are intended to be committed by them while acting upon the orders of the Crown in

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carrying out the Agreement of 1911; and it is alleged that they are personally liable for any loss caused by such acts.

The said Defendants plead in substance that the orders of the Crown were given in accordance with the terms of the treaty of 1911 and that this treaty, and the acts done by them in carrying out its provision under the orders of the Crown of which the Appellants complain, are acts of State, and that no suit will lie in respect thereof in the Courts of the Protectorate.

Having found the Masai to be foreigners in a foreign state, and also the Agreement of 1911 to be a treaty, I think this plea must be upheld. (*Secretary of State for India* v. *K. B. Sahaba* (1) cited supra; and *Buron* v. *Denman* (2).)

In the latter case, which was tried at bar before the Court of Exchequer in 1848, it was held that it makes no difference whether the tortious act complained of by the foreigner in a foreign country has been originally ordered by the State or has been subsequently approved by it.

The person who commits the act is exempted from all liability by reason of such order or ratification, and the foreigner in the foreign country is left with a remedy (such as it is) against the Crown only.

This remedy, in the case of a wrong, would be merely to adopt the words of Parke B., "by way of appeal to the justice of the State which inflicts it." It is clear that the wrong is no longer actionable.

In the present instance the 20th and 21st Defendants were acting with the full authority of the Crown in doing what they did, and the Appellants, not being British subjects, are without remedy by action at law, and must rely upon the sense of justice of the Government in dealing with their claims.

The plea of these Defendants of act of State would not avail as an answer to a claim by a British subject or a foreigner resident in England for the invasion of his rights; whether interference with the private rights of a subject by officers of the State to compel obedience to the terms of a treaty could be authorised otherwise than by the Legislature is an open question. In *Walker* v. *Baird* (3) the point was discussed by the Judicial Committee but not settled.

I will now deal with the contention of the Appellants that the Government are precluded from pleading act of State and that the Appellants are foreigners, by reason of "The Petitions of Right Ordinance, 1910."

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(1) Supra. (2) Supra. (3) 1892 App. Cases, 491.

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Section 3 provides that "all claims against the General Government of the Protectorate, being of the same nature as claims which may be preferred against the Crown in England by petition, manifestation or plea of right may, with the consent of the Governor, be preferred in the High Court in a suit instituted by the claimant as Plaintiff" in the manner prescribed. The rest of the Ordinance deals with the procedure to be followed.

I can find nothing in the Ordinance which could be held to prevent the Crown from exercising its prerogative right of entering into a treaty and from raising any plea open to it in an action brought against it by a foreigner to enforce the performance of a treaty in a municipal Court, including the plea of act of State in respect of acts done by it or its authorised officers to a foreigner in a foreign country in connection with such treaty.

As stated above, this suit has been brought with the fiat of the Governor. This consent however does not convert what is in substance an action to enforce a treaty into one of the class of cases in which petition of right is open to the subject or resident foreigner in England, described by Cockburn, C.J., in *Feather* v. *The Queen* (1) and adopted by the Judicial Committee as an "accurate exposition of the law" in *Windsor and Annapolis Railway Co.* v. *The Queen* (2).

Holding therefore, as already indicated, that the Masai are foreigners in a foreign country and that the plea of the Respondents in bar must succeed, I am of opinion that this appeal should be dismissed with costs.

(Appeal dismissed.)

Conditional leave to appeal to the Privy Council was granted but lapsed, owing to the Appellants failing to give security for costs.

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(1) Supra. (2) 11 App. Ca., 615.

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CRIMINAL CONFIRMATION.

Before HAMILTON, C. J.

REX *v.* THIMOA AND OTHERS Cr.C. $\frac{444}{1913}$ (January, 1914).

Indian Penal Code, Section 367—Abduction to subject to unnatural lust.

Held **:—" Unnatural " means contrary to the order of nature.**

By a certain custom of the Kikuyu tribe young men and women sleep together, but without sexual intercourse taking place. In order to compel some young women to sleep with them according to this custom the accused forcibly detained them, and were convicted of offences under Section 367, and sentenced to two years' rigorous imprisonment and 24 lashes.

On the case being sent to the High Court for confirmation of sentence the following order was passed :—

HAMILTON, C. J.—The accused in this case have been convicted under Section 367 of the Indian Penal Code of " abduction in order to subject to unnatural lust."

The facts are that the accused were jointly concerned in compelling young girls to sleep with them according to the " Kogwika " custom of the Kikuyu. By this custom the parties sleep together, but sexual intercourse does not take place either according to or contrary to the order of nature.

The wording of the section must, I think, be construed as meaning sexual intercourse contrary to the order of nature, and therefore the convictions under that section cannot in my opinion stand.

The offence of wrongful confinement has, however, been clearly proved, and the convictions are therefore altered to those of offences under Section 342, and the sentences are reduced in each case to one year's rigorous imprisonment.

The Acting Attorney General, to whom the papers have been submitted, has intimated his concurrence in this view of the case.

(Finding altered, sentences reduced.)

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CRIMINAL CONFIRMATION.

Before HAMILTON, C. J.

REX *v.* MURU WA NDURU Cr.C. $\frac{447}{1913}$ (January, 1914).

Indian Penal Code, Section 343—Wrongful confinement—Meaning of "wrongful."

***Held*:—Restraint exercised by a native over a native according to a recognised native custom which is not repugnant to justice or morality is not necessarily wrongful.**

The facts appear sufficiently from the judgment of the High Court, to which the case was sent for confirmation of sentence.

HAMILTON, C. J.—This case has been referred to the Attorney General, who has declined to offer argument in support of the conviction.

The evidence on the record amply shows the existence of an established custom sanctioned and given effect to by the native council, under which young girls of the Kikuyu tribe are required to cut and collect firewood for the chiefs.

There is nothing repugnant to justice or morality in such a custom if properly observed, and a chief's retainer seeing that it is carried out in an orderly way is not acting contrary to law.

The facts in the present case are that the accused, who is a tribal retainer, prevented a girl returning to her parents before the completion of her task. Her father, it appears, had asked for her to be allowed to return home during the period in which she, with other girls, was engaged on the wood cutting, in order that she might share in a family sacrifice, and the accused refused to let her go, as stated above.

On these facts he has been convicted under Section 343 of keeping the girl in wrongful confinement for three or more days, and sentenced to one year's rigorous imprisonment.

For the reasons given above I am of opinion that such restraint as was exercised by the accused over the girl did not amount to a wrongful confinement within the meaning of Section 343. I therefore reverse the finding and sentence, and direct that the accused be released.

(Finding and sentence reversed.)

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ORIGINAL CIVIL.

Before BONHAM CARTER, J.

WILLIAM HALL *v.* ATTORNEY GENERAL O.C. $\frac{50}{1913}$ N.R.B. —on behalf of the Protectorate Govt. (January, 1913).

Agreement for the sale of land—Area conveyed less than that agreed to be conveyed—Error of between 9 and 10 per cent. in computation of the area.

Held:—In an agreement for the conveyance of 642 acres or thereabouts, where 582 acres only were conveyed, the error of 60 acres was a material error not covered by the words "or thereabouts."

W. W. Cresswell, for Plaintiff.

H. A. Young, Acting Attorney General, for Defendant.

The facts are shortly stated in the judgment.

BONHAM-CARTER, J.—The Government contracted to sell to Mr. Hall 642 acres at Limoru, and after a considerable time they find themselves only in a position to convey 582 acres. This 60 acres missing is not a small error covered by the words "thereabouts."

The Government is liable for the difference, and I find the value of the land at Rs. 75 per acre. I make an order that the Government transfer the 582 acres to the Plaintiff, and pay him damages of £300, or Rs. 4,500. Judgment for Plaintiff with costs.

(*Judgment for Plaintiff.*)

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CRIMINAL CONFIRMATION.

Before HAMILTON, C. J., and BONHAM-CARTER, J.

REX *v.* NDOSI AND 6 OTHERS Cr.C. $\frac{2}{1914}$ (January, 1914).

Indian Penal Code, Section 374—Unlawful compulsory labour—Section 367, Abduction in order to subject to unnatural lust.

Held :—On the evidence offered on the charge under Section 367 it was not proved that force or threats were used, and where the facts might equally show consent on the part of the women it should not be inferred that compulsion was used.

Held also :—Even if the accused had intended to sleep with the women by the "Gwika" custom when they sent for them they could not be convicted under the Section.

Held also :—Individual members of the Kikuyu tribe, if they compel strangers to work for their private advantage, are guilty of an offence under Section 374.

The case was sent to the High Court for confirmation of sentence. After hearing the Acting Attorney General in support of the convictions, the following judgment, which sufficiently sets out the facts, was delivered by Hamilton, C. J. :—

The facts proved in this case are that the first Accused, Ndosi, is an unrecognised sub head-man, and the other accused are his askaris, or tribal retainers. They compelled certain Kikuyu girls to cut firewood for them for two days, and at night the girls slept in the retainers' hut by the "Gwika" custom. There is no evidence of the use of force by the retainers, but the magistrate infers that the girls consented under intimidation. The first witness, in fact, says, "We could not refuse or we would have been beaten."

Ndosi has been convicted under Section 374 Indian Penal Code of unlawfully compelling the girls to labour, and sentenced to six months' rigorous imprisonment, and the retainers have been convicted under Section 367 of abduction of the girls in order to submit them to unnatural lust, and sentenced to three years' rigorous imprisonment and 24 lashes, with the exception of the second accused, who has been sentenced to one year's rigorous imprisonment only, because he happens to be incapable of having physical intercourse with a woman. All the other retainers have, equally

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with accused No. 2, been convicted on the same evidence of abduction under Section 367, and there would therefore appear to be no logical reason why accused No. 2 should be treated differently from the others on account of his physical defect.

The fact that the others slept with the girls by the custom alluded to, in which physical intercourse does not take place between the sexes, does not affect the guilt or otherwise of the accused under the charge.

The Honourable the Acting Attorney General has argued that if the retainers, when the girls were sent for to cut firewood, had in their minds the intention to sleep with them by the custom in question they would have committed an offence under Section 367. This Court has, however, already held that the words † " unnatural lust " in this Section must be read strictly to mean contrary to the order of nature. If, therefore, the accused in this case, in fact, had at the time of sending for the girls intended themselves to sleep with them by the Gwika custom they would not have committed an offence under Section 367.

I would also add that there is a complete absence of any evidence that the girls at the time objected to sleep in the retainers' hut. They all seem to have gone when asked without resistance, and made no complaint, a state of affairs which is equally indicative of consent as of their being too frightened to object.

There is, I think, sufficient evidence on which to convict of an offence under Section 374. I therefore reverse the conviction under Section 367, and direct that it be entered under Section 374.

The retainers should not for an offence under this Section receive a heavier sentence than the sub-headman whose orders they carried out, and I reduce the sentence in respect of accused No. 2 to 7 to six months' rigorous imprisonment.

(Finding altered, sentences of accused Nos. 2 to 7 reduced.)

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† *Rex* v. *Thimoa and others, p.* 115.

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CRIMINAL CONFIRMATION.

Before HAMILTON, C. J., and BONHAM-CARTER, J.

REX *v.* KICHERRU AND MBOROSA Cr.C. $\frac{3}{1914}$ (Jan., 1914).

Indian Penal Code, Section 392—Robbery—Violence used in carrying away goods obtained by cheating.

Held :—Violence used in carrying away goods obtained by cheating is not robbery, as there has been no theft.

A native entered an Indian shop ostensibly to buy some wire. The bargain was concluded and the wire handed to him by the shopkeeper. An altercation then began about the price, and the native attempted to leave the shop with the wire, but without paying for it. The shopkeeper and his assistant endeavoured to prevent this, and were thereupon assaulted by the purchaser and his friend. The magistrate convicted them both of robbery, and sentenced one to three and the other to two years' rigorous imprisonment.

The case was sent to the High Court for confirmation of sentence, and after hearing the Acting Attorney General in support of the conviction the judgment of the Court was delivered by HAMILTON, C. J., as follows :—

After hearing the Honourable the Acting Attorney General in support of the convictions, the facts proved in this case will not, I think, support a conviction under Section 392 for robbery.

Accepting the finding of the magistrate that accused No. 1 entered the shop with the intent of obtaining the wire fraudulently, it nevertheless appears that the wire was handed to him in answer to his request : there was therefore no theft, and consequently no robbery; but if the accused thus obtained possession of the wire without intending to pay for it he committed the offence of cheating. Subsequently, when both the accused were tackled by the shopkeeper and his assistant, they committed the offence of causing hurt under Section 323. I therefore reverse the finding of the magistrate and direct that the conviction of the first accused be entered under Sections 420 and 323, and of the second under Section 323.

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As the offences actually committed by the accused are of a less serious nature than that of which they were convicted I reduce the sentence of accused No. 1 to eighteen months' rigorous imprisonment, *viz.*, nine months for cheating and nine months for causing hurt, to run consecutively; and that of the second accused to nine months for causing hurt.

(*Finding altered, sentences reduced.*)

COURT OF APPEAL FOR EASTERN AFRICA.

Before HAMILTON, C. J., East Africa, MORRIS CARTER, C. J., Uganda, KING FARLOW, J.

THE EAST AFRICAN INDUSTRIES, LTD., *Appellants*, orig. *Defendants*, *v.* POWYSLAND, B.E.A., LTD., *Respondents*, orig. *Plaintiffs*.
COURT OF APPEAL $\frac{8}{1913}$ (January, 1914).

Indian Contract Act, Section 6, Sub-Section 2—Tender and acceptance—Cancellation of tender where no acceptance sent within a reasonable time.

On August 10th the Plaintiff Company invited tenders for the supply of grain; on August 16th the Defendant Company sent in a tender. On 25th September a letter was sent accepting the tender, which letter was delivered on 27th September. The Defendants thereupon refused to carry out their offer, alleging that it was revoked by lapse of time, and the Plaintiffs consequently sued them for damages.

They succeeded in the High Court, the Court holding that the delay in communicating acceptance of the tender in September was not unreasonable.

The Defendants appealed.

Held:—(Reversing the judgment of the High Court). The true test was not whether the delay in September before communication of the acceptance was unreasonable or not, but whether a reasonable time had lapsed between the date of the tender and the date of the communication of the acceptance, and under the circumstances of the case from 16th August to 27th September was the lapse of a reasonable time sufficient to revoke the proposal.

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THE EAST AFRICAN INDUSTRIES, LTD., v. POWYSLAND, B.E.A., LTD. Crt. of Appeal 8 —— 1913

A. Morrison, for Appellants.

G. G. Atkinson, for Respondents.

The judgment of the High Court follows :—

BONHAM-CARTER, J.—I have only to decide one question of fact, namely, whether Mr. Whitlark's delay in accepting the tender of the Industries was reasonable or unreasonable.

Mr. Whitlark sent out his invitations to tenderers on August 10th. I assume that all these circulars would have been received by August 14th. Allow four days for consideration on the tenderers' part and three for the post, and Mr. Whitlark should expect all his tenders in by August 22nd.

With ordinary delays the acceptance should go out in two or three days. That is, a tenderer would in the ordinary course of events expect his answer by the end of August. Allow another ten days for negotiations with an ambiguous tenderer and it would bring the matter to September 10th. I should call that quite reasonable looking at the circumstances of this country, and it would also give the tenderer about four weeks to arrange his supply. In fact Mr. Whitlark did not get his answer delivered to the Industries until the 26th or 27th of September, and gave the Industries only ten days to deliver the corn. Was the extra delay unreasonable? The rule that an acceptance must be in a reasonable time does not mean that it must be immediate, or in twenty-four hours, unless there is something special in the custom of the market which makes it so. The custom of Mombasa produce merchants is not a matter that affects a contract like that of Mr. Whitlark's, which is not, if I may say so, a wholesale, but a retail contract, and is not comparable to the merchants' dealings which are of a speculative character. The matter is one of fact, and after weighing the circumstances I have come to the conclusion that the delay was not unreasonable. Judgment for fifteen hundred rupees and costs.

In the Court of Appeal the following judgment was delivered :—

HAMILTON, C.J.—This is an appeal from a Judgment of Bonham-Carter, J., sitting in the High Court of East Africa at Mombasa.

The facts of the case were not in issue; they are as follows :—

On 10th August, 1912, the Secretary of the Plaintiff Company sent out invitations for the supply of 48 tons of grain, delivery to be at Molo in consignments spread over the months October to February.

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It was requested in the invitation that tenders should be sent in as soon as possible.

On 16th August the Acting Manager of the Defendant Company sent in a tender.

On 25th September a letter was written accepting this tender, which letter did not reach the tenderer till 27th September.

The issue before the Court, there being no time prescribed in the proposal for its acceptance, was whether it was revoked owing to the lapse of a reasonable time without communication of the acceptance (Section 6, Sub-Section 2, Indian Contract Act).

The learned Judge found that a tenderer would in the ordinary course of events have expected his answer by the end of August. He then proceeded to consider whether the extra delay till 27th September was unreasonable, and came to the conclusion that it was not.

Now, I do not think that the manner in which this question was put was quite correct, and that as a consequence the finding of the learned Judge is not strictly on the issue.

The matter to be looked at was not whether the extra delay in September was unreasonable, but whether, in fact, a reasonable time had lapsed between the date of the tender, *viz.*, the 16th August, and the date of the communication of the acceptance, the 27th September.

When the matter is looked at in this way, and it is further taken into consideration that the commodity to be supplied was one in which the market fluctuates considerably from day to day, it is clear that a reasonable time lapsed sufficient to revoke the proposal.

That this is the correct view is further borne out by the fact that the communication of the acceptance did not reach the tenderer till three days before the date on which he would have had the right to deliver the first consignment, and ten days before the date on which he would have been liable in damages had he failed to deliver it.

For these reasons I am of opinion that the finding of the Court below must be reversed and judgment entered for the Appellant Defendant with costs in this Court and the Court below.

WM. MORRIS CARTER.—I agree.

S. C. KING FARLOW.—I concur.

(*Appeal allowed.*)

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ORIGINAL CIVIL.

Before BONHAM-CARTER, J.

RE. THE LAND ACQUISITION ACT, 1894. FRANCIS CHARLESWORTH'S OBJECTION. O.C. $\frac{2}{1914}$ (February, 1914).

Land Acquisition Act—Trees on land.

Held :—That the owner of compulsorily acquired land can only be allowed a proportion of compensation for trees if that land has been valued as a building site.

Quaere :—If the statutory 15 per cent. should be allowed on the land alone or on the land and trees.

The Government wished to acquire 47.32 acres belonging to Dr. Francis Charlesworth in the N.W. of Mombasa Island, for which Dr. Francis Charlesworth claimed £69,385.

The Collector awarded £21,294 as the value of the land and all contained therein, together with £3,194 2s. 0d., being 15 per cent. thereon; making a total of £24,488 2s. 0d.

To this award Dr. Charlesworth objected on three grounds :

1. The Collector erred in assessing the land and the trees together and by not allowing separate compensation for each.

2. The valuation of the Collector was wrong, and was not in accordance with the evidence produced before him.

3. On the evidence before the Collector the amount claimed by Dr. Charlesworth should have been awarded.

On the Reference Morrison appeared for Dr. Charlesworth.

Barth, A.G., for the Government.

A great deal of evidence was taken as to the value of land on Mombasa Island.

The *Attorney General* referred to (1) *Premchand Burral v. The Collector of Calcutta.*

(1) I. L. R. II. Cal. 103.

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Morrison in reply.

BONHAM-CARTER, J., in his Award weighed the evidence and continued :—

I consider on the evidence that £300 an acre was the full value of the site of the land in January, 1913. The question is intricate, and to give what I consider a large margin of safety I raise it to £350 an acre, which gives a value of

£16,056 for the plot.

Total compensation for the market value of the land, Section 23.1.i.

I have now to consider the question of compensation for the trees.

Dr. Charlesworth values them at £1,014, but admits that this is only hearsay. The Government admit the number, but deny the value.

I make Rashid bin Sud's values come to £1,422, but that is counting the young cocoanuts as partially grown.

It is laid down in the Act that the Court shall consider the damage by reason of the taking of any standing crops or trees which may be on the land.

I believe that it has been laid down in (1) *Secretary of State v. Duma Lal Shaw* that where a claimant asked that the land should be valued as vacant land for the purposes of erecting building on it, he could not at the same time claim the value of the trees on it on the footing that they would still remain there. Their proper value would be their value as timber when cut down.

I have not a report, but only a note on the case, but I believe this to be sound law as far as it goes.

Here, however, the trees have a certain value, that value being the saving while the land is not developed, or if under some circumstances the land should not be developed. The trees are almost valueless as timber. Assuming that the annual value of the tree is 10 per cent. of its capital value, and giving three years' profit as the most that anyone could get, taking into consideration that site value has been put on the land, and also taking the highest figure, I find the damage by reason of taking the trees as 10 per cent. of £1,422 for three years, or £426 13s. 4d., which I award under Section 23.1.ii. of the Act.

There is finally the question of the 15 per cent. I am clearly of opinion that this 15 per cent. should only be allowed on the

(1) 1908 B.C.W.N.

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£16,056 awarded for the market value of the land, which would make the total amount I should award as :

£	s.	d.	
16,056	0	0	Sub-Section 1.
2,408	0	0	15 per cent.
426	13	4	Trees.
£18,890	13	4	

There is, however, a Madras case (1) in 1906 which expressly holds that the 15 per cent. should be calculated on the trees as well as on the land, since trees are land by the definition. On that basis the award would be :

£	s.	d.	
16,056	0	0	Land
426	13	4	Trees
£16,482	13	4	Under Sub-Section 1.
2,472	8	0	15 per cent.
£18,955	1	4	

This is the highest that I could have awarded. The Collector, however, has awarded £24,488 2s. 0d., of which £21,294 is the value of the land and the balance interest. Under Section 25 of the Act I cannot reduce the award of the Collector.

Following the Madras Case (supra), I award the whole of the £21,294 as the market value of the land with the trees on it, or alternatively £20,500 for the land, Sub-Section 1, and £794 for the trees, Sub-Section 2.

The Collector's award is upheld and the objection dismissed with costs; the costs of the Collector to be paid by the Objector. Costs to be taxed by the Registrar, to state the amount in Court†.

(Award upheld, objection dismissed.)

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(1) Sub-Collector of Godavary *v.* Seragam & ors. 30 Mad. 151.
† Reported by BONHAM-CARTER, J.

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APPELLATE CIVIL.

Before HAMILTON, C.J., and BONHAM-CARTER, J.

KAKOO RATANJI *v.* REX Cr.A. $\frac{33}{1913}$ (February, 1914).

Order in Council, 1911—Application of Law—Limitation in appeals from convictions by Magistrates to the High Court.

On an appeal from a conviction of an Indian by a Second-Class Magistrate at Embu, the record on the face of it appeared to show that the Appellant had filed his appeal out of time according to the existing procedure, by which thirty days were allowed for the filing of appeals from Magistrates to the High Court. The appeal itself against the conviction was on the merits.

Held :—The law is to be applied so far as circumstances admit in conformity with the Criminal Procedure Code and Indian Limitation Act. As appeals from Magistrate under these Acts must be filed within 30 days, though they do not lie to a High Court in India, the fact that the Court to which they lie in East Africa is the High Court is not to be read as altering the substance of the law by which such appeals must be filed in 30 days.

G. G. Atkinson, for Appellant.

H. A. Young, Assistant Attorney General, for Crown.

Atkinson.—The Court to which the appeal lies is a High Court, and under the Indian Limitation Act applied to this country an appeal to such Court must be filed within 60 days. By the 1911 Order-in-Council the law is to be applied in conformity with the Indian Limitation Act.

Young.—A High Court in India is a Chartered Court, and so is in a different position from the High Court of East Africa.

An ordinary appeal from a Magistrate in India lies within 30 days to a Sessions Judge, whose functions are in East Africa discharged by the High Court.

Limitation of 30 days has been in practice always followed in this Court.

Atkinson, in reply—It is not necessary to look at the powers of the various Courts in India. The Limitation definitely provides for appeals to a High Court.

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KAKOO RATANJI v. REX Cr. A. 33 1913

The following joint judgment was delivered by

HAMILTON, C.J.—This is an appeal from a judgment of the District Commissioner, Embu, convicting Appellant under Section 380 Indian Penal Code, and sentencing him to three months' rigorous imprisonment.

The appeal was on the face of it filed more than 30 days from the date of the judgment, and therefore out of time according to the existing practice and procedure of this Court, and the Appellant was called on to show cause why it should not be summarily dismissed. At the hearing on the Rule it appeared that a considerable period had been spent by the Appellant in obtaining necessary copies, and his advocate also raised the point that in any event the appeal was filed within 60 days, the period allowed by Article 155 of the Limitation Act for an appeal under the Code of Criminal Procedure to a High Court.

There being some doubt as to the time occupied by the Appellant in obtaining his copies from the Magistrate's Court, we decided to admit the appeal to hearing on the merits, but at the same time to give a ruling on the point of limitation raised in order to make the application of the law certain.

Mr. Atkinson relies on the fact of this Court being a High Court, that is, the highest Court of original criminal jurisdiction in the Protectorate, and argues therefrom that the Indian Limitation Act, which is applied to this Protectorate, must, where it mentions a High Court, be held to apply to this Court in like manner as to a High Court mentioned in the Act.

Under the Order-in-Council, 1911, which amends Article 15 (2) of the Order-in-Council, 1902, the criminal jurisdiction of the High Court of East Africa is to be exercised "so far as circumstances admit in conformity with the Criminal Procedure and Penal Codes of India and the other Indian Acts in force."

The existing practice of a 30 day limitation of appeals was established under the Order-in-Council, 1897, when this Court was known as the "Protectorate Court," and occupied a position similar to that of a Sessions Court in India, in that it heard appeals from Magistrates. By the 1902 Order-in-Council the name of the Court was altered to "High Court," but it heard appeals from Magistrates as before, and the period of limitation remained in practice as before, 30 days.

Now the procedure here must be as far as circumstances permit in conformity with both the Procedure Code and the Limitation Act. They cannot be taken apart, but stand together, for the limitations in the latter Act are made to fit the system of Courts and procedure provided by the Code.

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The result of this combination is that appeals from ordinary magistrates of the 1st, 2nd, or 3rd classes, not specially empowered, are limited by a period of 30 days in India, and it appears to me that the closest conformity to that Act is to limit similarly similar appeals from magistrates in this country.

We have not here the same system of Courts or nomenclature as is provided in the Code of Criminal Procedure, and though our system in East Africa is derived from the Indian system, there are many and important differences, to which it is unnecessary to refer in detail.

But it is important to remember that such differences do exist, for it then becomes of peculiar importance when applying in East Africa an Indian Act framed with reference to the Indian Code, to avoid being misled by a use of similar terms which do not connote similar things, and to look at the substance rather than the form.

I am therefore of opinion that a limitation of 30 days in appeals from ordinary magistrates to this Court more closely conforms to the substance of the law to be applied than would be the case if the High Court of East Africa were simply to be read for High Court in the Act, for that would in fact apply a period of limitation to appeals from ordinary magistrates different from that contemplated by the Act, and would in my view be a conformity with the form rather than with the substance of the law.

On the merits I think the Appellant must succeed. The Magistrate came to the conclusion that the evidence of Complainant was corroborated in all important particulars, but he appears to have omitted to observe one discrepancy, which appears to me of such a serious nature as to throw considerable doubt on the Complainant's extraordinary story.

According to him, Complainant went to "choo," leaving Accused in his shop. He remained there half an hour, and as he was returning to the shop heard his cash box being broken open. Ndura, however, who was at the shop before the Complainant arrived, says that the Accused was in the shop not doing anything. He also says that when Complainant came up he caught hold of the Accused and blew a whistle.

In view of the highly improbable nature of the Complainant's story a contradiction in such an important matter from an independent witness raises a doubt as to its truth, to the benefit of which the Accused is, I think, entitled.

I therefore think the finding and sentence must be reversed, and the Accused acquitted.

(Appeal allowed.)

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COURT OF APPEAL FOR EASTERN AFRICA.

Before MORRIS CARTER, C.J., UGANDA, BONHAM-CARTER, and KING-FARLOW, J.J.

HALIMABHAI *v.* ABDARAHIM HAJI ISMAIL MITHU.
Orig. *Plaintiff, Appellant.* Orig. *Defendant, Respondent.*
COURT OF APPEAL $\frac{9}{1913}$ (March, 1914).

Law governing intestate succession of Memons in Mombasa—Hindu custom departed from—Mahommedan Law applicable—Costs ordered out of estate.

Held :—(† Reversing the judgment of the High Court of East Africa) Memons being Mohammedans, the law applicable to them is *prima facie* Mohammedan law.

Held also :—The onus being on Plaintiff, she established the discontinuance of the Hindu custom of succession, or, alternatively, the existence of a new custom in Mombasa of distribution according to Mohammedan law; consequently succession to property among Nassapooria Memons in Mombasa is governed by Mohammedan law.

Per KING-FARLOW, J.—This is subject to a special custom as to the widow's ornaments, which are returnable on death or remarriage.

Held also :—Costs should come out of the estate.

E. R. Figgis, A. C. Ross with him, for Appellant.

C. M. Dalal, R. M. Byron with him, for Respondent.

Figgis.—Memons are Mahommedans (*See* Seyid Amir Ali on Mahommedan Law, Vol. II., p. 137). The Court records do not show a single instance of a Memon estate being distributed in Mombasa by Hindu law. He referred to the following cases :—

(1) *Mirabivi* v. *Vellayanna.*
(2) *Sarabjit Partab Bahadur Sahi* v. *Ndarjit Partab Bahadur Sahi.*
(3) *Ashabai* v. *Haji Tyeb Haji Rahimtulla.*
(4) *Mahomed Sidick* v. *Haji Ahmed.*
(5) *Lala v. Hira Singh.*
(6) *Cassimbhoy Ahmedbhoy* v. *Ahmedbhoy Habibhoy.*
(7) *Lachman Rai* v. *Akbar Khan.*

† Reported E. A. L. R., Vol. V., p. 34.

(1) I.L.R. VIII. Mad. 464
(2) I.L.R. XXVII. All. 203
(3) I.L.R. IX. Bom. 115.
(4) I.L.R. X. Bomb. 1.
(5) I.L.R. II. All. 49.
(6) I.L.R. XII. Bomb. 280
(7) I.L.R. I. All. 440.

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Ross followed on the evidence.

Byron.—This is the first occasion on which a claim of this nature has been raised in the Court. In the event of a decision in favour of the plaintiff a Memon will be subject to a different law in Mombasa and Cutch. The law regarding Memons has been settled in Indian Courts. He referred to the following cases :—

(8) *Mahomed Sidick* v. *Haji Ahmed.*
(9) *Soorendronath Roy* v. *Mussamat Heramonee Burmoncah.*
(10) *Rahimatbai* v. *Hirbai.*
(11) *Sivananaja Perumal Sethurayar* v. *Muttu Ramalinga Sethurayar.*
(12) *Ramalakshmi Ammal* v. *Sivanatha Perumal Sethurayar.*
(13) *Patel Vandravan Jekisan* v. *Patel Manilal Chunilal.*
(14) *Hurpurshad and Others* v. *Sheo Dyal and Others.*
(15) *Gopalayyan* v. *Raghupatiyayan.*
(16) *Rama Nand* v. *Surgiani.*

The requirements necessary for proof of a new custom in Mombasa have not been met according to the rules laid down in such cases in the Indian Courts.

Dalal followed on the evidence.

An Indian coming to East Africa brings his personal law with him.

Figgis, in reply.—We have to prove discontinuance of custom, not creation of a new one. A Court may decide that a custom exists, but it does not legislate for the future. If the Hindu custom of inheritance was brought to East Africa it has been discontinued.

Cur. av. vult.

MORRIS CARTER, C.J., Uganda.—This is an appeal from a judgment of the Chief Justice of the East Africa Protectorate dismissing a claim by a widow of a Nassapooria Memon of Mombasa to a share in his estate.

The sole question for determination is whether intestate succession to Nassapooria Memons of Mombasa is governed by Hindu or Mohammedan law.

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(8) Supra
(9) 20 Engl. Reports 271.
(10) I.L.R. III. Bom 34.
(11) III. Mad. H.C. 75.
(12) 20 Eng. Reports, 570.
(13) I.L.R. XVI. Bom. 476.
(14) 3 Ind. App. 259.
(15) VII. Mad. H.C. 250.
(16) I.L.R. XVI. All. 221.

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The Nassapooria Memons are Indian Mahommedans; and it is settled law in India that generally speaking in questions of succession and inheritance the Hindu law is to be applied to the Hindus and the Mahommedan law to the Mohammedans. (1) *Jowala Buksh* v. *Dharum Singh*).

Moreover, in the case of (2) In *re Haji Ismail Haji Abdulla*, it was held that Cutchi Memons are Mohammedans to whom Mohammedan law is to be applied except where an ancient and invariable special custom to the contrary is established.

It has, however, been decided with regard to the Cutchi Memons that so far as the Bombay Courts are concerned the Hindu law of inheritance applies to Cutchi Memons, a special custom to that effect having been proved (3 *Ashabai and Another* v. *Haji Tyeb Haji*).

The Appellant's case is that Nassapooria Memons at Mombasa are now governed by Mahommedan law as regards succession. It was admitted on her behalf in the course of the case under appeal that in Cutch Nassapooria Memons are, equally with Cutchi Memons, governed by Hindu law as regards succession.

Upon this admission being made the Chief Justice ruled that the onus was on her to prove that Mohammedan law applied.

The Appellant does not appear to have objected to this at the time, but in the memorandum it is made a ground of appeal. The position which the Appellant takes up, as I understand it, is that although Hindu custom in respect of succession has been recognised by the Courts in Bombay so far as the Cutchi Memons are concerned, no decision has been made with regard to Nassapooria Memons, and that, consequently, the onus is on the Respondent to prove that such a custom prevails with regard to them in Mombasa to the present day. In order to save expense, however, she is willing to admit that the custom in Cutch as regards both divisions of Memons was the same, and continues so to the present day in that country. To this extent she admits the custom, but no further; in other words, she relieves the Respondent from proving the antiquity of the custom, but requires him to prove that it is continuous so far as Mombasa is concerned.

The learned Chief Justice has stated in his judgment that the term Cutchi Memons, in addition to its meaning as defining a subdivision of the community, is used with a geographical signification only, as indicating the home and place of settlement of the Memon community.

(1) Moo. Ind. App. 537
(2) I.L.R. VI. Bom. 460.
(3) I.L.R. IX. Bom. 115.

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From this I gather that he considers the decisions in Bombay apply to both Cutchi and Nassapooria Memons. Of the correctness of this view I am not quite convinced, as it appears clearly from the evidence that the Nassapooria Memons who have come to Mombasa came from Cutch, and not from Bombay, and that they, with a few others who have settled in Zanzibar and German East Africa, constitute almost the whole of the Nassapooria division, there being very few left in Cutch. Further, one of the witnesses for the defence has stated that there are "Cutchi and Bhujai Memons in Bombay, which tends to confirm one's impression that the Memons in Bombay are Cutchi Memons in the narrow meaning of the term.

If this be so I am not satisfied that the Appellant is not right in her contention that the onus of proof rested with the Defendant to prove that the custom existed in Mombasa. In order to prove a custom it must be shown not only that it used to exist, but that it is continuing, and it may be questioned whether, if the custom had to be proved, proof that it was continuing in Cutch would have been sufficient to prove its continuance in Mombasa in the case of a community which has been in East Africa for fifty or sixty years.

I do not, however, find it necessary to decide this point for reasons which will appear later

The case for the Respondent is that as the Nassapooria Memons were, and are, governed in Cutch by Hindu law as regards intestate succession, they brought that law with them to Mombasa.

This is the view adopted by the learned Chief Justice, and it is in accordance with the law laid down in (1)*Soorendronath Roy* v. *Mussamut Heeramonee Burmoneah* by the Privy Council with regard to family custom in the case of families emigrating from one part of India to another.

I propose to assume the contention to be correct for the purposes of my decision in this case, merely observing that the present is not a case of family custom.

The Respondent further contends that it is for the Appellant to prove an ancient and invariable custom to the contrary, and in support of this contention relies on various Bombay cases in which it is laid down that it is a settled rule that in the absence of proof of special custom Hindu law regulates succession among Cutchi Memons.

Although in Bombay the Courts may require proof of a special custom to the contrary in such a case, I think that this can only be taken to refer to Memons who allege a special custom, and that

(1) 12 Moo. Ind. App., p. 81.

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it would not apply to Memons who have emigrated and allege mere discontinuance of the old custom of inheritance according to Hindu law.

It is clear from the case of *Surendranath Roy* quoted above with regard to family customs of emigrated families that proof of a discontinuance of a custom would be sufficient to oust such custom, and that it is not necessary to prove a special custom to the contrary.

The present case appears to me to be one midway between a family custom and a territorial custom which is *lex loci*.

The case of (1) *Ahmedbhoy Hubibhoy* v. *Cassumbhoy Ahmedbhoy and Rahimbhoy Alladinbhoy* shows that in Bombay, although a custom with regard to property may be proved to exist in a particular sect in Kathiawar and Cutch, that the Courts will not necessarily hold that the custom is in force in Bombay in the case of members of that sect who have come to Bombay and live under different conditions.

The Court commented on the fact that customs may fall into desuetude, and the case is in my opinion very analagous to the one before us, where a custom is admitted to prevail in Cutch but not in Mombasa.

In the present case, therefore, if the Appellant has produced sufficient evidence to show that the custom of Hindu succession has ceased to be generally observed by the Nassapooria Memons in Mombasa and the Respondent has not led sufficient evidence in rebuttal, in my opinion she must succeed without being called upon to prove a special custom.

In (1) *Hirbai* v. *Gorbai*, which was followed in a case before the Bombay High Court reported in I.L.R. 12 Bombay 280, it was held that it would not be reasonable to require among Khojas, who are a sect of Mahommedans who follow the Hindu law of succession, such stringent proof of a custom of inheritance amongst them differing from ordinary Hindu law, as from a Hindu. It was considered in that case that the Court ought to act upon satisfactory proof that the custom has existed for a considerable time, and has been generally accepted by the great majority of the Khoja community.

In the present case in my opinion a similar rule should be applied, and less stringent proof should be required of the discontinuance of the custom of following the Hindu law of inheritance by the Nassapooria Memons, who are a Mohammedan sect who

(1) I.L.R. XIII. Bom. 534.
(1) 12 Bom. H.C. 294.

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have come to a country where Mohammedan influence is powerful, than would be required in the case of Hindus discontinuing a Hindu custom; and, that if satisfactory proof is given in a considerable number of cases that succession has gone in accordance with the law which binds Mohammedans in general, the Court should act upon such evidence and find that the discontinuance of the custom has been proved.

I will now turn to a consideration of the evidence which was given in the High Court.

For the Appellant several witnesses have been called, who have testified not only to their opinion that succession among them is governed by Mohammedan law, but also to several cases in which that law has been followed. Their evidence has been corroborated by the production of several Court records of administration cases, and by a case in which before the institution of the present suit a party based his claim to certain property on the ground that he had bought his sister's share of his father's estate.

The instances given are not very numerous. This, however, may be accounted for partially by the fact that the Nassapooria Memons were not wealthy on their arrival in the Protectorate, partially because many of them may have made wills.

Some sixteen instances of intestate succession according to Mohammedan law have been testified to, and of these, in my opinion, some dozen have been proved.

Some of the witnesses for the Respondent have been bound to admit that there have been exceptions to the rule that Hindu law is followed, and have admitted certain cases in which Mohammedan law was followed.

All the documentary evidence available is in favour of the Appellant.

Twenty-one instances were given by witnesses for the Respondent in which Hindu law had been followed, and the female relations got no shares; of these none are admitted by the Appellant. But as regards one of them it is admitted by Haji Kassim, one of the witnesses for the Respondent, that one estate (Haji Ahmed Saleh's) was distributed according to Mohammedan law; in another (Haji Omar Yakub's) it is clearly proved that Mohammedan law was followed, the administration file having been produced; in a third (Juma Bachlani's) the balance of evidence is, in my opinion, in favour of the fact that the daughter made a claim and was in some way satisfied; in a fourth case (Abdulla Gul Mahomed's) there is the evidence of Ex. 13 showing that the son in 1908 based his claim to certain property on the ground that he had bought his hister's share in his father's estate; in a fifth case (Haji Yakub

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Abdullah's) two witnesses for the Appellant swear that Mohammedan law was followed, and their evidence is corroborated by Exhibit 11, the record of the administration before the Court; in the sixth case (Yusuf Ahmed's), where the estate was variously described as being of the value of Rs. 4,000 to Rs. 5,000 and Rs. 8,000 to Rs. 10,000, three witnesses for the Appellant swear that the Accused died in debt, and their evidence is clearly substantiated by Exhibit 12, which is the Court record dealing with that estate as insolvent; in a seventh case (Ayoub Satadina's), two witnesses, one being the deceased's son, swear that no property was left, and their evidence is corroborated by Exhibit 18, in which a creditor in Mandvi in India accepts Rs. 300 in full satisfaction of the deceased's debt to him of Rs. 2,502.15; in an eighth case (Haji Sidik Isaak's) one witness for the Appellant swears the deceased was sold up two years before his death, and did not, in his belief, trade afterwards, a statement which is corroborated by Exhibit 17, the record of the bankruptcy of the deceased, from which it appears that the estate paid Rs. 309 out of Rs. 2040, and that the deceased had done no business for eighteen months on account of illness, and was still sick when examined by the Court; in a ninth case (Hussein Mondani's) three witnesses swear the deceased died in debt, two of whom were creditors who could not get paid; in a tenth case (Haji Isaak Barradia's), similarly, three witnesses, two of whom were creditors, swear there was no estate; in an eleventh case (Omar Abdul Renman's) two witnesses swear he died in debt, one of whom, his son, says he paid his father's debts; and in two other cases Haji Mahomed has sworn that no property was left; and in another case another witness swears that the deceased's son had informed him that the deceased had left no property, but had been supported by his son before his death.

Of the remaining seven cases in three the persons best qualified to speak were not called, and in a fourth he was called, but asked nothing with regard to the succession. Of the three cases which remain, in one the value of the estate was put by the witness as between Rs. 1,000 and Rs. 2,000 only; in another the value is not mentioned, and may therefore be regarded as trifling; and in the third the witness does not specify the approximate value, but describes it as "plenty of money."

Of the two witnesses who testify to the first of these three instances one is the brother of the administrator, the respondent, who has been proved to be absolutely incorrect with regard to one of the five instances he gives, by the admission of one of the witnesses for the Respondent; in another instance the balance of evidence is in favour of his being wrong, and in the two other instances he is contradicted by evidence on the other side.

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The second of the two witnesses under consideration is another brother of the Respondent. In my opinion his evidence is totally unreliable. He is admittedly wrong in two instances; in another he states that succession in an estate which he values at Rs. 8,000 to Rs. 10,000 went according to Hindu law, whereas the estate was administered as an insolvent estate, and in other instances the weight of evidence is against him.

I am therefore of opinion that the three instances of Hindu succession upon which no comment has been made by the other side are not proved.

Taking the evidence for the Respondent as a whole, so far as it concerns instances in which property has descended according to Hindu law as apart from mere opinion, it appears to me either entirely unreliable, inaccurate, or of trifling importance; and if any estates have been distributed according to Hindu law, they would appear to have been of little value, and any females entitled under Mohammedan law would appear to have been well advised in receiving maintenance at the hands of their male relations in preference to insisting on a share in the estate. Moreover, as was pointed out in the case of *Mirabivi* v. *Vellayanna*, I.L.R. 8 Madras, 465, " Mohammedan ladies often prefer being maintained by their brothers to taking a separate share for themselves. A single instance to the contrary would outweigh many partition deeds when the existence of a binding custom is in question." In the present case we have several instances to the contrary clearly proved.

No documentary evidence whatever has been produced for the Respondent, who has, moreover, been unable to give evidence of any kind as to a single instance in which, before this case, objection to administration according to Mohammedan law has been taken.

The single point which has been clearly established in favour of the Respondent is that the ornaments only remain with a widow during her life, or until re-marriage. This may well be a special custom as to ornaments, and although not in accord with the claim of the Appellant, it is also contrary to the claim of the Respondent, who sought possession of all jewellery which the Appellant had received from the Respondent, though it is true he alleges special reason for this..

The learned Chief Justice has attached great weight to the evidence of Haji Kassim and largely discounted that of Haji Mahomed. I do not find myself able to concur in this estimate of their evidence.

Haji Kassim has practically only testified to his opinion, which, from the evidence, I consider mistaken.

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On the whole his evidence has been given fairly. He has admitted that the administration of some estates was conducted in accordance with Mohammedan law, and that he has heard of no objections to such administration, but he has been inclined to exaggerate the value of the estate of Mithu Ramadan, which was alleged to have been administered by Hindu law, speaking of it as worth, "perhaps Rs. 5,000," whereas the son puts the value at Rs. 1,000 to Rs. 2,000 only, and Haji Mahomed says there was no property; and again, with regard to the estate of Mahomed Yusuf, he considers it a special case because the children were too young to arrange for maintenance for their mothers. The balance of the evidence shows that this estate was administered by the principal men of the community, who would presumably be the first to see that the children were not defrauded of their rights.

It is to be observed that this witness was apparently interested in seeing that the present case was administered by Hindu law, as his daughter had married a son of the deceased.

The evidence of Haji Mahomed appears to me to have been given very fairly on the whole, and to be amply corroborated in many important particulars. The only points against his evidence are that he has not been quite open as regards the descent of ornaments, and his statements with regard to his son's property appear somewhat improbable, though it is possible he might be able to explain the matter. It is also true that in two or three instances he has spoken from hearsay, but his evidence in this respect, though not admissible in proof of the particular instances, is relevant as forming the grounds for the opinion he expressed. The fact that he included one estate in his affidavit as an intestate estate, whereas there was some kind of will, does not appear to me to discount the value of his evidence. It is to be noted that the document did not dispose of the property to individuals by name, but directed that it should go according to the law—the Mohammedan law—of intestate succession in the contingency of his death while away on pilgrimage to Mecca.

The evidence has been dealt with by me at very great length, as I felt that as my estimate of it was not in accordance with that held by the learned Chief Justice it was incumbent upon me to give my reasons fully in a case of this importance.

I consider, therefore, the Appellant has proved a discontinuance in Mombasa of the custom whereby Nassapooria Memons inherited in accordance with Hindu law. As I am satisfied that that custom is no longer general and invariable, even if I am not correct in the view of the law which I have taken earlier in the case, I should be prepared to hold on the evidence that a new custom of inheritance

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according to Mohammedan law has grown up and is generally observed in Mombasa among the Nassapooria Memon community in the same way as in the case of Ahmedbhoy Hubibhoy it was held that a new custom differing from the old one in Cutch and Kathiawar had arisen in Bombay with regard to the Khojas in that city.

I should therefore allow the appeal and hold that succession to property among Nassapooria Memons in Mombasa is governed by Mohammedan law, and that in accordance with that law the Appellant is entitled to a share in the estate of the deceased Haji Ismail Mithu. I should further direct that the costs of both parties, apart from those which the Chief Justice dealt with prior to his judgment, should come out of the estate.

The point for decision was one of great importance to the community, and although I doubt whether the administrator was justified in attempting to administer this estate in accordance with Hindu law, in face of the facts that no other estates had been so administered before the Courts in Mombasa, and, on the other hand, that several estates had been administered according to Mohammedan law, yet he would have been justified in applying for directions, in which event the same point would have been fought and decided.

BONHAM-CARTER, J.—The learned Chief Justice Hamilton has found as a fact that Haji Kassim's statement, "There is not a uniform practice of inheritance among the community in Mombasa. The majority have followed our old custom; some, the minority, the Mohammedan law," fairly sums up the true state of the facts.

It has been argued by both sides that this is a mis-finding, and that either there are practically no cases of Mohammedan or practically no cases of Hindu inheritance. On the evidence on the file before me I am inclined to think that the number who followed the Mohammedan custom was a large proportion of the community, even a majority, but I do not think it material.

The custom that Memons, as far as inheritance is concerned, follow Hindu law is a custom contrary to the general law, that Mohammedans are governed by Mohammedan law, and Hindus by Hindu law, and for such a custom to be valid it must be continuous and invariable.

I am satisfied on the evidence that this custom has been departed from to a very great extent, and therefore it is no longer good. A custom contrary to the general law does not require to be displaced by a stronger custom. Sufficient abandonment will destroy the custom and replace the general law, and this, in my opinion, has occurred here.

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KALIMABHAI v. ABDARAHIM HAJI ISMAIL MITHU. Crt. of Appeal. 9

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I have had the opportunity of reading the judgments of Chief Justice Carter and Mr. Justice King-Farlow, and agree with them. The judgments so set out my views that I do not consider that I can usefully add anything. I consider the appeal should be allowed with costs as directed by Chief Justice Carter.

KING-FARLOW, J.—The short point in this case is whether the Mohammedan or Hindu law of inheritance applies to Nassapooria Memons in Mombasa.

For the purposes of this appeal I will assume that the Nassapooria Memons, when they migrated from India to East Africa, in the absence of evidence to the contrary, brought with them a custom with regard to inheritance under which, despite the fact that they have long been Mohammedans by religion, succession followed the Hindu, and not the Mohammedan law.

I will not do more than assume this to be the case because I am not altogether satisfied that the decision of Sir Erskine Perry in the Supreme Court of Bombay in 1847 concerning the law of inheritance applicable to Cutchi Memons could be held to cover Nassapooria Memons, and do not find it necessary for me to decide the point.

I confine myself to saying that in my opinion, on the evidence on the file, I am satisfied that the Appellant has made out her case, and that the verbal and documentary evidence produced before the Court shows that such alleged custom, if it was ever followed by Nassapooria Memons in Mombasa, is no longer good in law in Mombasa.

She has proved discontinuance of a nature which, in my opinion, is fatal to the validity of such a custom, and has proved to my satisfaction that the Nassapooria Memons of Mombasa, who are Mohammedans in what may be regarded as a Mohammedan country, have in a considerable number of cases for some ten or more years past, applied the Mohammedan law to the administration of intestate estates. In other words, the alleged custom of following the Hindu law has been displaced by the Mohammedan law. I do not think it necessary for the Appellant to prove what would amount to a new custom before she can succeed in this action, and I adopt the view expressed by Chief Justice Carter in this connection in his judgment herein.

She has discharged the onus of proving the alleged custom is no longer good, and in my opinion, as the Nassapooria Memons are Mohammedans they must now be held to be governed by Mohammedan law with regard to succession.

So far as the question of ornaments is concerned, I am satisfied on the evidence and on admissions by counsel for the Appellant that

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a custom has been proved to exist under which they remain with the widow during her life, or until re-marriage.

I have had an opportunity of reading the judgment of Chief Justice Carter herein, and I concur therewith, and for the reasons therein set out.

It is therefore unnecessary for me to set forth my views at greater length, and I think that this appeal should be allowed, costs to come out of the estate in accordance with the directions in the judgment of Chief Justice Carter.

(*Appeal allowed.*)

ORIGINAL CRIMINAL.

Before HAMILTON, C. J.

MULUWA GWANOMBI AND OTHERS REPRESENTING THE JIBANA TRIBE *v.* ABDULRASOOL ALIDINA VISRAM O.C. $\frac{60}{1913}$

(March, 1914).

Land tenure among the Jibana—Tribal custom—Land situated within the mainland dominions of H.H. The Sultan of Zanzibar—Claim to land by right of settlement among and purchase from individual members of the tribe—Right to sue for possession.

An Arab, Ali bin Salim, visited Jibana country for many years, and spent considerable intervals of time there, principally for the purpose of trading in copra. He bought cocoanuts from the Jibana, and also took them from trees planted by the Jibana which had been mortgaged or sold to him. After his death his son and Wasi purported to sell to the defendant in the action a tract of land comprising some 600 acres, which he alleged had been acquired by his father from the Jibana by purchase and settlement. On the defendant being put in possession his manager began to exercise rights of ownership over the land, on which the Jibana drove out his

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servants and burnt their huts. The defendant applied to Government for protection and was put back on the land, the Jibana being advised to sue in order to prove their claim to rights over the land.

Held :—The Jibana have no title to the land by their own custom, either collectively or individually, but only a right to use the land which is in the occupation of the tribe. They cannot, therefore, confer title on a would-be purchaser either from the tribe or from individual members of the tribe.

Held also :—A sale of trees or mortgage of trees with right to take the fruit does not convey a title to the land on which the trees stand.

Held also :—The possession of the Defendant was a hostile possession, in which the Plaintiffs had never acquisced, and the land in question being a portion of the land in the occupation of the tribe, the Plaintiffs were entitled to sue for possession.

O. Daly, for Plaintiffs.

R. M. Byron, for Defendant.

Byron.—In an action for ejectment the Plaintiff must prove his title. Only the true owner can oust the man in possession (see the case of [1] *Asher* v. *Whitelock*). The tribe do not claim to be owners of the soil, and therefore cannot sue to oust us from our possession. The only person who can sue is the Government. The owner of the legal title has not been joined. He referred to (2) *Lachho* v. *Har Sahai*, (3) *Gobind Prasad* v. *Mohan Lal*, and (4) *Allen* v. *Woods*.

In the pleadings a joint tenancy is set up; where is the severance? By their own showing the Jibana are tenants in common. The case set up in the evidence contradicts the pleadings.

As regards dealings with Nyika land see the case of (5) *Parenti* v. *Barclay*, where the Government were grantors of Duruma land. This case governs lands acquired by us as a settlement among the Jibana. Mohammedan law applies, following the leading case of (6) *Charlesworth Pilling* v. *Secretary of State*, and the British Government now stands in the shoes of the Sultan. Sale of land in the Sultan's dominions is not affected by the domestic law of the Jibana. If the Jibana custom is upheld the land will be held back in perpetuity from development, which is contrary to public policy.

Daly.—History shows the Wanyika tribes formerly nearer the sea. They have been gradullly pushed back. The land in question is clearly within the boundaries of land in occupation of the Jibana tribe. The custom of the tribe that such land could not be sold

(1) 35 L.J.Q.B. 17.
(2) I.L.R. XII. All. 46.
(3) I.L.R. XXIV. All. 157.
(4) 68 L.T. 143.
(5) E.A.L.R. IV. 80.
(6) E.A.L.R. I. 24.

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has been proved beyond doubt; therefore no question of sale under Mohammedan law arises. The Jibana could not sell what they had not got, *i.e.*, title to the freehold. The evidence as to Ali bin Salim acquiring title by settlement is unsatisfactory and unreliable.

As regards possession we were in actual possession till we were turned off by defendant's servants. The possession of defendant is adverse. We therefore have the right to sue for possession. The words "joint tenants" in the plaint are of no special significance. He referred to (1) *Perry* v. *Clissold*, Halsbury's Laws of England, Vol. xxiv., (2) *Ismail Ariff* v. *Mahomed Shous*, (3) *Gopeenath Doss* v. *Dyanidhee Soondura Mohapather*, and (4) *Vithaldas* v. *Secretary of State*.

Curia av vult.

HAMILTON, C.J.—This is a representative action brought by certain members of the Jibana tribe, by leave of the Court, on behalf of themselves and other members of the tribe, against an Indian merchant of Mombasa.

The Plaintiffs allege that the Defendant has entered upon a certain portion of their tribal land, claiming it to be his, and pray for a declaration that as against the Defendant or any person claiming under him they are entitled to possession of the land in question, and for an order for delivery up of possession.

The land in question lies some fifteen miles north of Mombasa, and near to and to the east of the Kaya Jibana, that is the sacred hill and ancient stronghold of the tribe, and between the Kaya and the sea, from which it is some eight or nine miles distant. It is therefore within the conventional ten mile line which forms the landward boundary of the mainland dominions of the Sultan of Zanzibar.

The Jibana are a subdivision of the people generally known to the Swahilis as "Wanyika," that is, the people who first inhabited the "Nyika," or wilderness (*Krapf*).

For the origin and history of the Wanyika as far as it is at present known or can be ascertained, I would refer to the excellent evidence given by Mr. Watkins, who has made a special study of their history and customs.

The Wanyika are a Bantu people who migrated southwards from the neighbourhood of Shangwaya, near what is now called Port Durnford, between the Juba and the Tana Rivers. It is impossible to fix with any accuracy the date at which they arrived in the country in which they now live, but Mr. Watkins places it at

(1) App. Cases, 1907, p. 73
(2) I.L.R. XX. Cal. 834
(3) W.R. VII. 485.
(4) I.L.R. Bomb. XXVI. 410.

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certainly not less than 200 years ago, and possibly much longer. And as he says that it cannot be ascertained with certainty whether the "Tissa Taiifa," or nine tribes of Mombasa who claim rights over land to the north of the Island of Mombasa, arrived before the Wanyika, or whether the Wanyika arrived before the nine tribes, it is probable that the date of their arrival was considerably more than 200 years ago.

The neighbouring Nyika tribes to the Jibana are, on the north the Wachonyi, and on the south the Wakambe, there being apparently, having regard to the evidence as to the boundary between the Jibana and the Wakambe, definite and well recognised boundaries between the lands occupied by the different Wanyika tribes.

On the east, where they came in contact with the coast settlements of the Arabs, there appears, as might naturally be expected, to have been little or nothing in the nature of fixed boundaries, and the Jibana cultivated their short crops and made permanent cocoanut plantations wherever they pleased, subject always to the extent eastwards to which the coast Arabs permitted them to come. For though there was some trade between the two, there was naturally little in common between the Pagan Jibana and the Mohammedan Arab, who bought and sold their children into slavery.

I do not propose to attempt to say what actually the eastern limits of the Jibana were, but as it has been argued that the land in question is not, and never has been, part of the Jibana tribal land, it will be necessary for me to give a finding on this point. And for the reasons which follow I have come to the conclusion that it is a part of the Jibana tribal land.

In the first place there is overwhelming evidence that the old cocoanut plantations along the Mwandege River, which crosses it from east to west, were planted by Jibana, and by no one else. Secondly, members of the tribe converted to Islam (known as Mahaji), having assumed an individual status incompatible with the customary communal tribal life, and in order, no doubt, also to live with members of their own faith, always leave the tribal land and go to live nearer to the coast. Settlements of such Mahaji have been formed at Kidutani and Chengoni, both near to, but to the east of the land in question, where there are no Mahaji.

Thirdly, in 1908, when in order to have a recognized boundary, Mr. Osborne, on the instructions of the Government, put in what is known as "the Osborne line," he endeavoured to draw a line that would as far as possible give effect to the *status quo*, leaving the lands of the pagan Jibana on the west and of the Mohammedans, whether Arabs or converts, to the East.

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This line, which appears to have been accepted by the parties concerned, and to which no objection has been made, leaves the land in dispute in Jibana country, and confirms the evidence referred to above of Jibana plantation and absence of Mahaji, which satisfies me that, though possibly there may have been a denser Jibana population in the neighbourhood of, or to the west of the Kaya, the land in question lies within lands which were none the less occupied by the Jibana as part of their tribal land, and are still so occupied. Incidentally, I may mention that in the conveyance under which the Defendant claims title, the tribal land of the Jibana is put as his north boundary, and of the Wakambe as his south boundary, and it is incredible to suppose that the Jibana should not have extended to the Kambe boundary or used and cultivated the rich intervening valley of the Mwandege.

I have dealt at some length with this question so as to remove all doubts as to who were the original occupiers of the land in question. There is nothing to show that before the dates in issue in this case it was ever owned, occupied or dealt with by Arabs, whether belonging to the nine tribes or not, or by any other persons than pagan Jibana. The Arab Government, it is true, claimed to administer the Wanyika tribes by means of Sheikhs or Government agents appointed by the Sultan, but the control they exercised seems to have depended largely on keeping the Wanyika in good temper. It therefore now becomes necessary to consider the rights over the soil claimed by the Jibana, and their system of land tenure.

The general evidence on this point, as given by the Wanyika witnesses and borne out by that of the Government officers acquainted with their customs, is overwhelming, and may be shortly summed up as follows :—

The Wanyika believe that land belongs to God, and cannot be sold either by an individual or by the Elders of a tribe, and the right to use the land is common to all the members of the tribe. On the other hand, individual ownership is recognised in the results of an individual's labours on the land. That is to say, he can sell trees planted or inherited by himself, and he can sell the right to make use of a clearing prepared by him for the cultivation of short crops, but in neither case can he convey any title to the ground on which the trees stand or which has been cleared for cultivation.

The right to deal with trees includes also that of mortgaging them, the mortgagee taking their fruits by way of interest, and the mortgage subsisting for the benefit of his heirs, subject always to the right of the mortgagor or his heirs to pay off the original loan and redeem the mortgage at any time. Such a mortgage could be

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granted to a person other than a Mnyika, but it appears to have been contrary to the Nyika custom to sell trees to any person other than an Mnyika, and the reason for such a restriction is obvious when the length of life of a cocoanut tree is considered.

Strangers, subject to the approval of the Elders, could obtain leave to occupy and plant Nyika tribal land, but according to Mr. Watkins, if they planted cocoanut trees they could not sell them to a stranger, that is to say, that the same restriction on the sale of trees applied to all trees in Nyika country, whether planted by a Mnyika or by a stranger. It appears, further, that this permission to strangers to use and occupy the land is not nowadays granted so readily as formerly, as the Mohammedan settler in Nyika country has been apt, under the temptaton of opportunities that offer, to endeavour to apply Mohammedan law, and to sell the land on which his crops or trees stand. Cocoanut plantations are naturally permanent, but within the tribal boundaries individuals cultivated for short crops where they pleased, moving about, as the land became exhausted, from one patch to another, and there appears to have been nothing to prevent such cultivation being carried on close to or under cocoanut trees belonging to or mortgaged to others, provided that the trees themselves, or access to them, was not interfered with.

Now, it has been contended that the general evidence as to custom is contradicted by facts, and I will therefore deal with the instances of contradiction on which the Defendant relies.

In the first place he alludes to the evidence of the Government officers as to there having been numerous attempts in recent years on the part of individual Wanyika to sell land, and although, as it has been said, such attempts were always objected to by the Elders, the very fact that they were made, it is argued, shows that the Wanyika did not consider themselves bound by the custom preventing them parting with land. This argument would not be without weight had it the support of concrete instances of such sales, and I will therefore consider those instances which have been alleged in its support.

First there is the case of Hamis Kombo, Sheikh of the nine tribes, who had a shamba at Chengoni, which his son inherited. No weight can be attached to this, as Chengoni is in the Mohammedan settlement to the east of the tribal lands of Jibana, added to which there is no evidence of the land having been bought or sold. Next, there is the evidence of Gege, an M'Rabai, as to land in the neighbourhood of Rabai, which shows that the C.M.S. Mission were given permission to settle there, and that the Government have disposed of lands in the district for the Railway and

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other purposes. That the Government have done so does not affect the custom of the tribe, though it may tend to show that the Government has claimed the right to deal with lands in their occupation. Finally, he says that the Court interpreter at Rabai has, equally with other members of the Mission, been given leave to plant trees, and that he has done so on a plot of land given him by the Elders, on which formerly stood trees mortgaged to him by an M'Rabai. How far his rights to dispose of that land again extend does not appear. Then there is the case of Hamis Maalim, who declares he bought a shamba at Mwandaza, in Jibana country, but from his cross-examination it would appear that the transaction was, in fact, a mortgage, and that he was paid off before leaving the Jibana country some three or four years ago. It would, however, appear that in 1908 he borrowed money from a Mombasa Arab and mortgaged to him this same shamba as security. Failing to pay his debt, the shamba was sold by auction, and bought by another Arab, who subsequently obtained a judgment in the Town Magistrate's Court for the value of produce taken from the shamba by one Luvumbi, who was the same man who had repaid Hamis Maalim the very sum which Mamis Maalim said he gave for the shamba. Everything, therefore, points to the original transaction here having been one of mortgage of cocoanut trees by Jibana to Hamis Maalim.

The next instance is that of Saleh bin Ahamed, who says that he has a shamba at Cha Simba, in the North of Chonyi country, of cocoanut trees, which he bought more than twenty years ago. He left Nyika country eight years ago, and has not been back since. He does not claim to have disposed of these trees or the land on which they stand, and his statement as to how he got the trees is entirely uncorroborated.

These are the instances to which I was particularly referred by Mr. Byron, and they fail to convince me that the general evidence of the Nyika custom with regard to land is incorrect, or that it has been departed from.

That the Wanyika, in fact, did not sell their land is borne out by the evidence of the Liwali, Sheikh Salim bin Khalfan, and is incidentally corroborated by the noticeable fact that Sheikh Hamis Kombo, Sheikh of the nine tribes, with all the influence of his position with regard to the Wanyika, does not appear to have purchased any land from the Jibana, but to have obtained leave to plant at Chengoni.

I therefore find that according to Jibana custom :

(1) Neither the tribe, as represented by the Elders, nor individuals, have any title in the soil in Jibana country, but that

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all members of the tribe have a common right to occupy and use the land in possession of the tribe.

(2) That an individual Jibana cannot, nor can the Elders, alienate the land so purchased.

(3) Individual ownership in the results of labour on the soil is recognised, and trees and clearings can be sold, and trees mortgaged subject to the restriction that such sales cannot be made to a person who is not a Mnyika, and though such mortgages may be made to a non-Mnyika, they may be redeemed at any time.

I have now to consider how far these customs of the tribe are affected with regard to such portion of the tribal land as lies within the dominions of the Sultan of Zanzibar, by the existence of Mohammedan law within those dominions.

It has been argued on the basis of the proposition that Mohammedan law applies to sales of land within the Sultan's dominions, and that as the British Government is administering those dominions on behalf of the Sultan by virtue of the Agreement of 1895, this Court would recognise a title which would have been recognised by the Sultan's Courts before the Agreement; therefore a sale of land by Wanyika which would have been recognised by the Sheriah must also be recognised by this Court. I have no fault to find with either of these propositions, or with the conclusion, which is in accord with the judgment of the Privy Council in (1) *Charlesworth and Pilling* v. *Secretary of State*, and the later case of (2) *Parenti* v. *Barclay*, decided by me in 1911. But this is, of course, subject to the general rule of law which applies in Sheriah equally with English law, that no person can sell more than that which he himself has; and as no Jibana, or body of Jibana, have more than a common right to occupy and use the tribal land, title to which is not claimed by them individually or collectively, it follows that a sale of a portion of such tribal land, whether by one or more individuals, is bad, and can confer no title.

Against this conclusion it has been urged that it would tend to tie up the land in perpetuity, and prevent it ever being alienated, which would be contrary to public policy. I agree that such a state of affairs might be highly undesirable, but I am not concerned here with policies, but with facts, and there are means by which the Government can alter such a state of affairs if it thinks fit.

The question of sale of trees as apart from the land is on a somewhat different footing. Here individual ownership is recog-

(1) Supra. (2) Supra.

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nised, and though the domestic custom of the tribe would restrict the sale of trees to Wanyika only, I am unable to hold that for that reason a sale to a non-Mnyika is bad. The property in the trees belongs to the individual, and a sale of such property to an Arab would be good in Sheriah, however contrary to Nyika policy and custom.

Now, having held that the title to tribal land is not vested in the Wanyika, I have next to deal with the question of their right to sue in this action. It has been objected, and I think rightly, that the nature of the tribal tenure has not been correctly described in paragraph 2 of the plaint, which states that "they are and have been from time immemorial by themselves and their predecessors in title owners in possession as joint tenants." Mr. Daly has admitted that this description does not accurately apply to the nature of the customary land tenure of the tribe set up, and which was intended to be set up in the case, but he states that it is sufficiently accurate to give a general idea of the land tenure of the tribe. As there has, in fact, been no misleading of the Defendant owing to any inaccuracy in this description, and the case has been fought throughout on the question of the rights of possession of the parties, I do not think the objection is one of great moment, and in this connection I would refer to the first issue as framed before the commencement of the hearing.

> "Is the land in possession of Defendant in dispute in this case Jibana tribal land, and if so are the Plaintiffs entitled to possession as against the Defendant?"

Now, at the time the suit was filed the Defendant was admittedly in possession, and is spoken of as being in possession, but the manner in which he came to be so in possession has to be carefully considered with regard to the claim to possession put forward by the Plaintiffs, as the main issue in the suit turns, in my opinion, on this point. For the Plaintiffs do not allege that the title to the land is in them, and sue to eject the Defendant by right of such title, but they claim to be in possession, and ask for a declaration that they are entitled to possession only as against the Defendant as a trespasser. And for them to succeed in this contention it is necessary for them to prove not only their possession, but that such possession was uninterrupted up to the date on which they were wrongfully dispossessed by the Defendant.

It will be convenient therefore at this point to consider the facts of the case leading up to the issue between the parties.

The ascertainment of these facts presents peculiar difficulties, partly because some happened many years ago and the evidence as to them is oral, vague and uncertain, and uncorroborated by inde-

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pendent facts or documentary evidence, and partly because the evidence on either side is strongly tinged with partisanship, which in certain instances has blossomed into the most flowery untruth. I have endeavoured to sift this evidence as well as I can, and the facts, so far as I can find them, are as follows :—

In June, 1912, the Defendant was declared the purchaser at public auction of a number of shambas at Jibana, the property of Ali bin Salim El Mandiri, deceased, and certain documents of title were handed to him putporting to be conveyances of cocoanut trees and land to Ali bin Salim by various Jibana. These documents have, with one exception, unfortunately since been lost, and secondary evidence of registration copies was admitted to prove their contents.

Subsequently to the sale the Defendant's manager, Mahomed Yusuf, was put in possession by Ahamed bin Ali, the son and wasi of Ali bin Salim, who, according to his own evidence, had not the least idea of what land he was conveying. Mohamed Yusuf began to cut boundaries according to the information given him by Ahamed, and these boundaries included, as shown by his conveyance, executed on 5th September, 1912, and his plan, some 600 acres of land, containing 2,000 cocoanut trees. No sooner did he begin to deal with the land and turn off the Jibana whom he found there than disturbances arose. A large number of Jibana came down and forcibly drove off his men and destroyed the huts he was erecting, on which he applied for police protection. The Government sent police, and instituted an enquiry into the facts, and advised the Jibana to take an action in the Courts to test the validity of the Defendant's claim. The Plaintiffs consequently filed this action on 8nd August, 1913, and the Defendant thereupon applied for a temporary injunction to restrain Plaintiffs from interfering with his possession. The Plaintiffs filed a cross application, and an order was made restraining the Plaintiffs from interfering with Defendant cocoanuts, and the Defendant from interfering with the Plaintiffs harvesting their crops on the land in dispute.

Ali bin Salim had died in August, 1911, at Mombasa, having been brought in from Jibana sick with his last illness a few weeks previously. Between that date and the notice of the sale in May, 1912, nothing seems to have been done with regard to any property of his in Jibana, and directly the purchaser at the sale attempted to exercise rights of ownership over the soil the Jibana who were there objected.

We have therefore to go back and ascertain what rights, if any, Ali bin Salim had over the land and trees which his wasi purported to convey to the Defendant.

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It is claimed on behalf of the defence that these rights arose from two different sources, first by purchase from individual Wanyika, and second by acquisition through settlement and planting. Incidentally it was alleged during the course of the case that Ali bin Salim was in a peculiarly favourable position both to buy and settle Jibana land, as being a member of the nine tribes, but as regards this it does not appear that a member of the nine tribes in fact received any preferential treatment in this respect from Wanyika, and Ali bin Salim was not in any event a member of the nine tribes. It is unnecessary, therefore, to refer to this point further.

Now the story put forward by the defence is that Ali bin Salim first went to Jibana some forty years ago, and lived and spent the greater part of his time there, and by gradual purchase from Jibana natives of small plantations, and by planting himself, gradually built up the estate of 600 acres and 2,000 cocoanut trees which his son purported to convey to the Defendant.

The Plaintiffs, on the other hand, allege that he first went to Kidutani about ten years ago, in order to trade in copra, that he advanced money to the natives and obtained mortgages on a certain number of trees, that he used to visit Jibana once a year at the time of the nut harvest in order to buy grain and rice and nuts and take those from the trees mortgaged to him and make copra, but that he never planted himself, or made or owned a shamba.

Both these contradictory stories are supported by a mass of evidence given with an amount of assertion as positive as it is vague, the value of which has been often still further reduced by the addition of obviously imaginary detail. It is therefore necessary to analyse the two stories as carefully as may be, to ascertain, if possible, where the truth lies.

In the first place it became fairly obvious in the course of the trial that Ali bin Salim's first acquaintance with Jibana was a good deal more than ten years ago.

The Plaintiffs have apparently chosen this date with a shrewd eye to the twelve year rule of limitation, hoping that if they could establish the first connection of Ali bin Salim with Jibana within this period it would be of material assistance to their case. On the other hand, I have considerable doubt if the date put forward by the Defendant is correct, but I am inclined to think it was probably twenty-five years ago at least, and that being well beyond the period of prescription the exact date is not very material.

It is clear that he first began to trade in Kidutani, and then moved into Jibana and put up a small Swahili house on the hill of

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Mwanawige, where he lived on his periodic visits. He was a man of active habit, with business aptitude, and a will of his own. His chief house, where his principal wife resided, was in Mombasa; he had a shamba at Junda and business relations with Takaungu and Malindi, all of which places he used to visit. Having regard to these facts I disbelieve the story of the defence that he spent the greater part of the year at Jibana, and find that he visited there annually. This view is to some extent corroborated by the fact that when his house fell down some years before his death he apparently did not think it worth while rebuilding, and though then old and somewhat infirm in health, he was content to sleep in a makuti kibanda for the short period of his visits. The suria who accompanied him to Jibana has not been called, but as to what he did while there, it is fairly established that he bought nuts and made copra, and also bought rice and grain from the natives, and shipped his stuff away from Kidutani, to which place it was carried both by his own porters and Jibana, who worked for him for pay. It is also established that he bought cocoanut trees, and as evidence of this there are the copies put in of the documents handed over to the Defendant by his wasi. But though these documents are alleged by the Plaintiffs to be in fact mortgages, they are drawn as sales of trees and land, and I hold them to be sales which convey the trees, but which, for the reasons I have already given, do not convey the land. Now, if the trees mentioned in these documents are all added together they account but for a small fraction of the total of 2,000 which the wasi purported to convey to Defendant, and to account for the balance it is alleged that Ali bin Salim planted them himself. It is also alleged that these trees are recognisable by the fact that they are well planted in Arab fashion, which gives some 70 trees to the acre. But if the whole 2,000 trees were planted in this fashion they would occupy only 30 acres, which leaves a balance of 570 acres to be accounted for out of the 600 which the wasi purported to convey. As to these 570 acres, it is alleged that Ali bin Salim himself cultivated them in rice and short crops.

Mr. Byron has admitted that he cannot prove his boundaries, and this admission is, I think, correct, for I do not believe there is a word of reliable evidence to convince me that Ali bin Salim himself ever claimed the boundaries now put forward, and there is considerable reason to doubt whether he ever planted any cocoanuts or cultivated any crops. My reasons for coming to this conclusion are, first, if Ali bin Salim did, in fact, cultivate and plant on the grand scale that the Defendant would have me believe, how came it that he had no plantation manager or overseer, and that he left his 600 acre estate with no one in charge for many months in the year?

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How is it that though many have testified to carrying loads for him, not a single witness has been called who planted for him? His nut-counter, whom he took from Junda, went to the extent of saying that his master never bought nuts, but used only to plant, so anxious is he to make out the case for his old master's son! On the other hand, a number of Jibana have sworn that Defendant is now taking nuts from their trees on the Mwandege, which were neither mortgaged nor sold to Ali bin Salim. The evidence as to his planting cocoanuts or cultivating crops is largely hearsay, and exceedingly vague, and I am unable to hold that Ali bin Salim ever did in fact plant cocoanuts or was in possession of the tract of land which his son and wasi has purported to convey to the Defendant. I am satisfied that he had cocoanut trees there which were either sold or mortgaged to him, and it is possible that he was hoping in the course of time to consolidate his purchases into a shamba, but the first purchase of which we have a written record dates only from 1904, seven years before his death, and is followed by the strange and unexplained mortgage transaction of 1905 with Said bin Rashid, of which Ahamed obtained the reconveyance, which he registerd in June, 1912, ten months after his father's death. This has all the appearance of an attempt to concoct a title, and after seeing and hearing Ahamed in the box I profoundly mistrust any dealing which he has had with his father's property.

On the view I take of the evidence, I hold it is not proved that Ali bin Salim was ever in possession of the 600 acres of land claimed by the Defendant, or that, with the exception of the cocoanut trees bought by or mortgaged to him, he had any interest in the land in question. The possession of the land, subject to Ali bin Salim's rights over those trees, always remained with the Jibana tribe, and the first instance of the exercise of adverse possession was when Mohamed Yusuf, a year after Ali bin Salim's death, attempted, under colour of the conveyance from Ahamed to the Defendant, to prevent certain Jibana having access to their trees and to the river, and to turn others away from their cultivations.

Shortly, therefore, I hold that the Plaintiffs are entitled to sue for possession, and that the onus is on the Defendant to prove a better title. This onus he has, in my opinion, failed to discharge, and I therefore find in the affirmative on both parts of the first issue.

As regards the second issue, as to estoppel, which was rightly not pressed by the Defendant, the evidence is against any acquiescence by the Plaintiffs, and the finding is in the negative.

On these findings the question of limitation does not arise, and I declare that the Plaintiffs are entitled to possession of the land in

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dispute as against the Defendant, and judgment to that effect will be entered with costs.

The Defendant, on the other hand, will be entitled to have access to the cocoanut trees on Mwanawije or on the Mwandege which were purchased by or mortgaged to Ali bin Salim, and included in the conveyance to him by Ali bin Salim's wasi.

(Judgment for Plaintiffs.)

APPELLATE CIVIL.

Before HAMILTON, C. J.

SULEMAN VIRJI & SONS *v.* MANGALDAS.

Appellants, orig. *Plaintiffs*. *Respondent*, orig. *Defendant*.

C.A. $\frac{6}{1914}$ (April, 1914).

Indian Contract Act, Section 16—Hundi signed by party when suffering from effects of illness—Onus of proof as to fair business transaction on party suing on the hundi.

Suleman Virji and Sons sued Mangaldas, C. A., on a hundi presented by them to Mangaldas and signed by him at a time when he was recovering from a severe illness. Mangaldas pleaded that at the time of signing the note he was mentally incapable of transacting business, and that his signature was obtained by undue influence. Mangaldas proved that his mental capacity had, in fact, been affected by severe illness, and was so affected at the time that he signed. The Subordinate Court held that on these facts the onus was on the Plaintiffs to prove that no undue influence had been used to obtain Defendant's signature, and in the absence of such proof dismissed the case against him. Suleman Virji and Sons appealed on the ground that the onus had been wrongly placed on them.

Held :—On the facts proved as to Defendant's mental state the onus was correctly placed by the Magistrate on the Plaintiffs to show that no undue influence had been used.

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W. W. Cresswell, for the Appellants.

O. Daly, for the Respondent.

The judgment of the Subordinate Court was as follows :—

E. R. LOGAN.—The medical evidence shows that Defendant's mental capacity was affected by a severe illness at the time when he signed the promissory note in question, and that he was not fit to transact business at the time.

The hundi was brought to him by Plaintiff's servant, and he was told, " Here is the hundi from Suleman Virji; sign it," without any explanation, and he signed it.

The fact that Defendant was sitting up and reading a paper, in my opinion, proves very little. The mental effect of a severe illness may remain long after the physical appearance of illness has passed. The case is governed by Contract Act, Section 16. On the facts proved by the Defendant, the onus is on Plaintiffs to prove there was no undue influence. Suit is dismissed as against the † second defendant with costs and pleader's costs.

This judgment was affirmed by the High Court on appeal :—

HAMILTON, C.J.—On the evidence as recorded in the case, the learned Town Magistrate in my opinion placed the onus of proof correctly, and gave the only decision that was possible on the facts proved.

The appeal is dismissed with costs.

(*Appeal dismissed.*)

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† The case was originally instituted against two defendants, Mangaldas being the second.

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APPELLATE CIVIL.

Before HAMILTON, C.J.

CHATUR AND LALLCHAND, *Appellant*, orig. *Plaintiffs v.* ALLIBHAI RAHIMTULLA, *Respondent*, orig. *Defendant.* C.A. $\frac{7}{1914}$ (April, 1914).

Contract by telegraphic correspondence—Offer made on 31st December, acceptance sent on 2nd January—Public holiday intervening.

Held :—In considering the promptness of an acceptance sent by telegram the existence of a public holiday is to be taken into consideration.

W. W. Cresswell, for Appellants.

J. Lawson Walton, for Respondents.

On 31st December Defendant offered to buy maize of Plaintiffs at a certain figure, the offer being sent by wire. The 1st of January was a public holiday, and on the 2nd the Plaintiffs replied by wire accepting the Defendant's offer. The Defendant subsequently failed to supply the maize, and the Plaintiffs sued him for damages.

The Town Magistrate held that the acceptance was not binding as there was delay in making it, and to be binding it should have been despatched sooner. The Plaintiffs appealed on the ground that there had been no delay in replying to the offer.

The High Court delivered the judgment following :—

HAMILTON, C.J.—The only question for decision in this appeal is whether there was a binding contract under the telegraphic correspondence between the parties. The learned Magistrate held there was not owing to the lapse of time between 31st December and 2nd January, on which later date Plaintiff wired his acceptance of Defendant's offer.

It so happens that the intervening day, the 1st January, is a gazetted public holiday; this day may therefore be eliminated, and the result is that the reply was sent off on the first business day after the despatch and presumably the receipt of the offer.

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From the wording of Exhibit 4 it is obvious that Respondent himself regarded it as a bargain, as he refers therein on 4th January to another contract as "our previous contract," to distinguish it from the newly made contract.

This being so the Appellants are, in my opinion, entitled to succeed, and the case must go back to the learned magistrate to assess damages.

The appeal is allowed, with costs.

(*Appeal allowed.*)

ORIGINAL CIVIL.

Before HAMILTON, C.J.

T. HORNE *v.* J. USHER JONES. O.C. $\frac{2}{1914}$ N.K.R.O. (April, 1914).

Res judicata—Civil Procedure Code, Section 13, Explanation II.—Subsequent action with regard to claims that should have been included in former suit between same parties.

Held:—Where in an action an account has been taken between partners after litigation of the matters in dispute between them, it is not thereafter open to one of the parties to bring a fresh action with regard to matters then litigated or to lay a claim for damages with regard to them which claim might and ought to have been made in the former action.

A. J. Berry, for Plaintiff.

L. Wright, for Defendant.

The facts appear sufficiently in the judgment following:—

HAMILTON, C.J.—The Defendant in this case has raised the preliminary objection that this action will not lie, the issues between the parties being *res judicata* by reason of the proceedings in Civil Cast No. 4 of 1913, District Registry, High Court, Nakuru, between the same parties.

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In that case the Defendant in this case was Plaintiff, and the Plaintiff in this case was Defendant, and the matter in dispute between them was mainly as to their respective rights with regard to certain oxen and material used on a contract with the Public Works Department, which dispute was raised on the present Plaintiff's counter claim for the division of the oxen and their yokes and chains, or for the payment of Rs. 1,600.

The issues then framed on this part of the case were :—

Was there a partnership?
If so, what money was due from and to either party?
And was Defendant entitled to a division of the oxen?

The learned Judge found that the oxen were held in half shares, and that there was a partnership. He also held that the then Defendant was entitled to the partition of the oxen or to the Rs. 1,600 claimed, and he allowed the counterclaim with costs.

That action was filed in June and heard in August, 1913, and the Rs. 1,600 were paid on 27th August.

The Plaintiff now claims for loss suffered by him owing to the wrongful detention of the oxen by Defendant between 31st March and 27th August, and for the return of certain of their harness and a plough, which articles were in Defendant's possession at the time of the former action.

Having regard to the judgment in that action it is obvious that Plaintiff cannot now claim for the harness or for the plough if it was intended to be included as part of the material used on the contract then in question, as is admittedly the case.

As regards the claim for loss for wrongful detention, I am of opinion that in view of the issues then raised between the parties this matter both might and ought to have been made a ground of attack and included in the counterclaim.

And if the Plaintiff omitted at that time to include it when the whole question of the respective rights of the parties over the oxen and with regard to their earnings were in issue, it is not open to him to make such a claim now by way of a fresh action.

I hold that under Section 13, Explanation II. of the Civil Procedure Code the action will not lie, and dismiss it with costs.

(Action dismissed.)

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ORIGINAL CIVIL.

Before HAMILTON, C.J.

RADHA KISHEN AND SON *v.* LELAND. O.C. $\frac{24}{1914}$ N.R.B. (April, 1914).

Indian Contract Act—Section 112—Sale of goods by sample—Execution of contract given to third party by promisee—No privity of contract between third party and promisee—Liability of promisee to third party under guarantee of payment—Place of inspection of goods.

Defendant agreed with a milling company to supply 20 tons of grain. Not being able himself to supply the grain, he gave the contract to Plaintiffs, having agreed with them as to the sample of grain to be supplied. Plaintiffs gave him Rs. 100 commission for giving them the contract, and he guaranteed payment by the mills on the performance of the contract. The Plaintiffs sent 20 tons of inferior grain to the Thika Railway Station, consigned to the mills, and the milling company removed 10 tons to the mills without inspection. At the mills these 10 tons were found to be inferior, and the Company applied to the Defendant. The Defendant told them to look to Plaintiffs, which they did, returning to them the 10 tons not yet removed from the Thika Station. Plaintiffs thereupon sold these 10 tons at a loss without notice to the Defendant, and sued the Defendant for the value of maize sold to his order, or alternatively for payment under his guarantee.

Held :—The Plaintiffs having taken over the contract and being accepted by the Milling Co. as the contractors, could not sue the Defendant for the value of goods sold to his order.

Held also :—The Defendant was liable on his guarantee for payment for all maize accepted by the Milling Co., but not for a greater amount than the Milling Co. would be liable to pay Plaintiffs.

Held also :—The place of inspection was the place of delivery, in this case the Thika Station.

W. W. Cresswell, for Plaintiffs.

A. J. Barry, for Defendants.

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The Court delivered the following judgment :- -

HAMILTON, C.J.—The Plaintiff in this case is an Indian merchant of Nairobi, and the Defendant is a European farming at Kikuyu.

The Defendant deals largely in maize, and in December of last year received an order from the Thika Mills, with whom he had had previous dealings, to supply 20 tons of maize at Rs. 2.25 a load. Not being able to supply the stuff himself he went to the Plaintiff and asked him to, and after sampling some maize at his place and being satisfied that it was of the quality required, it was agreed between the parties that Plaintiff should supply maize of that quality at the price offered, f.o.r. Nairobi, consigned to the Thika Mills, to whom Plaintiff was to look for payment. It was further agreed that as Plaintiff did not know the Thika Mills Defendant guaranteed payment by them on the contract being performed, and the Plaintiff undertook to pay Defendant Rs. 100 commission when he (Plaintiff) was paid. Plaintiff consequently sent two trucks of maize of 10 tons each by rail, consigned to the Thika Mills, and the way-bills were handed over by his agent to the Mill manager at the Thika Station. The Mill manager, without examining the maize, had one truck-load carted up from the station to the Mills at considerable expense, and when he came to examine it found that it was very badly weevilled, and not of the sort that he had ordered. He therefore wired to the Defendant, and the Defendant asked him to communicate direct with Plaintiff, which he says he did. This communication has not been produced, and the Plaintiff denies receipt of it, but the fact remains that he returned the second truck load to Plaintiff, who resold it without notice to the Defendant, at a loss of 21 cents a load.

The Plaintiff now claims from the Defendant the value of the maize sold to his order, or alternatively for payment under the guarantee.

The Defendant did not notify the Thika Mills that he was not supplying the maize, and had passed on the order, as he says to Plaintiff, and the Mills referred to him when they found the maize was bad; and it was not till the manager got his letter of 2nd January that he regarded him only as commission agent. There was therefore originally no privity of contract between the Thika Mills and Plaintiff, and when the Mills found fault with the maize and Defendant notified Plaintiff, Plaintiff requested him to go with him to Thika to settle the matter.

Now, had the Mills refused to accept Defendant's account of the transaction they had undoubtedly a right of action against him,

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but after his letter of the 2nd they accepted Plaintiff as the contractor and returned him one truck-load, and that Plaintiff regarded himself as the contractor is borne out by the fact that he had given Defendant a commission to get the order, and subsequently resold the returned maize without notifying him, though he endeavoured by reference to him to avoid his liability for the bad maize supplied.

I am therefore of opinion that Plaintiff, having taken over the contract from Defendant, cannot sue him for the value of the maize supplied by him to the Mills. And as one of the conditions of the contract he took over was that maize of the quality seen by Defendant was to be supplied, and an inferior quality of maize was, in fact, supplied, the Defendant is not liable on the guarantee, unless the Mills in fact accepted the maize delivered to them by Plaintiff.

As regards this part of the case, it has been argued that the place of inspection is, in the absence of agreement to the contrary, the place of delivery—in this case the Thika Station—and that if the Mill manager omitted to inspect the goods at the Station and carted them away to the Mills, he must be held to have accepted them, and cannot thereafter reject them. The case referred to by Mr. Cresswell, (1) *Perkins* v. *Bell*, supports this contention, and the Defendant is therefore, in my opinion, liable under his guarantee to pay for the maize so accepted. The guarantee, however, does not extend to a greater amount than the Thika Mills would be liable to pay the Plaintiff for the accepted maize, as to the value of which there is only the evidence of the Mill manager's offer of Re. 1 a load. Taking this basis I find that the Defendant must pay the Plaintiff Re. 1 a load on 10 tons.

Judgment for Plaintiff accordingly, with costs.

(*Judgment for Plaintiff.*)

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(1) L.R. 1. Q.B. 1892, 193.

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ORIGINAL CIVIL.

Before HAMILTON, C.J.

IN *re* F. MARQUORDT, DECEASED, EX-PARTE ADMINISTRATOR GENERAL. O.C. $\frac{64}{1913}$ (April, 1914).

Realization of deceased person's assets—Expenses incurred by administrator of estate acting in conjunction with mortgagees —Liability of estate.

Held :—Expenses incurred by an administrator for the better realisaton of mortgaged property, though with the approval and joint action of the mortgagees, being for the benefit of the estate generally, must come out of the estate.

J. W. H. Parkinson, Administrator General.

Harrison, Salmon, Cresswell, for the Mortgagees.

The parties, having filed affidavits, applied for a ruling as to the liability for expenses jointly incurred in an endeavour to realise to the best advantage a farm forming part of the estate of the deceased, which was the subject of a mortgage.

The facts appear sufficiently in the order following :—

HAMILTON, C.J.—The facts on which the application now before me is based are shortly as follows :—

The Administrator General, as administrator of the estate of F. Marquordt, deceased, acting in conjunction with Messrs. Harrison, Salmon, Cresswell, the Solicitors for the mortgagees of a farm at Fort Ternan belonging to the deceased, decided to endeavour to obtain a better price for the property by sub-dividing it and putting it up to auction in lots. This step was taken on expert advice, and might reasonably have been expected to prove of considerable benefit to the estate.

The mortgages on the property, together with interest due on the date of sale, amounted to £5,003 6s. 4d. The expectations of a good sale of the subdivided plots were not realised, and the whole block was eventually bought in for the mortgagees by their solicitors

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for a sum of £4,700. The costs of the sub-division and sale charges amounted to Rs. 3,575.39, and I am now asked to decide whether these expenses should be borne by the general estate of the deceased or come out of the price paid for the property by the mortgagees.

Now, had expectations been realised, and the sub-divided property been sold for a sufficient price to pay off the mortgage debt, this question would never have arisen, as the proof of benefit to the estate would have been self-evident, and the expenditure incurred by the administrator would have been clearly justified as costs of realisation properly incurred.

As the event has proved, however, the price realised for the security has been insufficient to pay the mortgages in full, and the mortgagees can still prove for the balance of their debt along with other unsecured creditors against the general estate. But because the expenses incurred by the Administrator General in making the sub-division in the hopes of benefit to the estate have failed to secure that benefit it cannot, I think, be argued that these expenses must be borne by the mortgagees, who, though they may have hoped thereby to realise their security in full, might have adopted other methods of dealing with their security, and could not in any event have benefitted beyond the extent of their claim.

On the grounds, therefore, that the expenses were incurred for the benefit of the estate, I direct that they be a charge against the general estate of the deceased.

ORIGINAL CRIMINAL.

Before HAMILTON, C.J.

REX *v.* (1) LEHNA SING,
(2) M. M. DE SOUZA.
O.Cr. $\frac{24}{1914}$ (April, 1914).

Criminal Procedure Ordinance, 1907, Section 4—Failure of accused person to claim when before the Magistrate to be dealt with as a European—Claim made in High Court for trial by jury.

Held :—**An accused person who has omitted when before the Magistrate to claim to be dealt with as a European cannot first raise such claim when on trial before the High Court.**

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REX
v.
(1) LEHNA SING
(2) M. M. DE SOUZA.
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B. G. Allen, for Accused de Souza.

The Magistrate made no enquiry as to whether my client claimed to be a European. The point can therefore be raised now under Section 4 (2) of Ordinance 14 of 1907. My client is not to be deprived of his statutory right owing to the Magistrate's omission.

H. A. Young, Assistant Attorney General, for Crown.

The accused was defended by counsel in the Lower Court, and his claim should have been made there. Under Section 4 (2) of the Ordinance he shall not assert it at any subsequent stage of the same case.

HAMILTON, C.J.—The point has been raised here that owing to the omission of the Magistrate to enquire of the second accused under Section 4 (2) of Ordinance 14 of 1907 whether he was a European or American, he will be deprived of his statutory right to trial by jury if he is not allowed to raise it now.

The view I take of the matter is somewhat different. The accused has not a statutory right to be tried by jury, but he can only obtain that right if he succeeds in establishing his claim before the Magistrate to be dealt with as a European, and if he does not claim to be so dealt with before the Magistrate he shall be held to have relinquished his right, and shall not be allowed to assert it at a subsequent stage of the same case. Trial in this country is under Section 32 of the Courts Ordinance, 1907, by a Judge with three Assessors, except where otherwise expressly provided. Ordinances 5 of 1906 and 14 of 1907 make such special provision, and to be entitled to the benefit of those Ordinances the accused must make and establish his claim in accordance with them. The second accused in this case was represented by counsel before the Magistrate, and the claim that is now made on his behalf should have been made there, and cannot now be entertained.

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APPELLATE CIVIL.

Before HAMILTON, C.J.

LALI BIN AHMED *v.* ASHA BINTI SHEIKH AHMED.
Appellant, orig. *Plaintiff*. *Respondent*, orig. *Defendant*.
C.A. $\frac{8}{1914}$ (May, 1914).

Sheriah—"Khula" divorce, essentials for—Divorce certificate defective.

Held:—The essential parts of a "Khula" divorce are (1) the mutual consent of the parties, (2) the payment by the wife of the sum agreed on.

Held also:—A defective entry in the Register of Mohammedan Divorces does not invalidate a divorce in itself valid.

A. F. MacCrae, for Appellant.

Respondent in person.

The facts appear sufficiently from the judgment of the Appeal Court:—

HAMILTON, C.J.—This is an appeal from a judgment of the Town Magistrate, Nairobi, in Civil Case 182/13 of his Court.

The Plaintiff (Appellant) sued the Defendant (Respondent) for restitution of conjugal rights. The Defendant pleaded that she had been divorced, and the issue framed in the case was, "Has Defendant been validly divorced by Plaintiff?"

The divorce set up was that known as a "khula divorce," by which the husband agrees to divorce his wife on receipt of a certain sum of money.

It is clear from the evidence that an agreement for a khula divorce had been arrived at, but the Plaintiff alleged that he refused to complete his part of the agreement as the Defendant failed to pay the agreed sum.

On this point the evidence was of a most contradictory character, and the learned Magistrate was of opinion that there had been gross and deliberate perjury on one side or the other. The matter was further complicated by the fact that the certificate of divorce put in by the Defendant was most incomplete, wanting

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LALA BIN AHMED v. ASHA BINTI SHEIKH AHMED. 8 1914

some of the material particulars required by the Mahommedan Marriage and Divorce Registration Ordinance.

The question, however, as to whether in fact there had been a valid divorce was rightly decided by the learned Magistrate on the evidence of witnesses, apart from the divorce certificate, errors in which, though giving ground for suspicion, would not of themselves invalidate a divorce validly granted.

Relying on the fact that the Kathi, who was not an interested party, swears to the divorce having taken place, and that he consequently issued the certificate, he found in favour of the Defendant.

I am not in a position to differ from the Lower Court on this finding of fact.

It has, however, been argued in this Court that the divorce was invalid by reason of the words being only spoken twice instead of three times. But this is not necessary in a "khula" divorce, the essentials of which are the agreement of the parties and the payment by the woman of the sum agreed on,† and as the finding of the Lower Court on both these facts is in favour of the woman the divorce was valid. And as I am unable to say that the Court's finding of fact was wrong the appeal must be dismissed with costs.

(Appeal dismissed.)

ORIGINAL CRIMINAL.

Before HAMILTON, C.J.

IN THE MATTER OF AN APPLICATION BY ABDULLA BIN MOHAMED.

O.Cr. $\frac{31}{1914}$ (May, 1914).

Indian Criminal Procedure Code, Section 497—Bail in a non-bailable offence, when to be refused.

Held:—The mere opposing by the Police of an application for bail does not fetter the discretion of a Magistrate to grant bail.

† cf. Min. Haj. Vol. II., ch. XXXVI.

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The Town Magistrate, Mombasa, was asked to grant bail in the case of an Arab arrested on a charge of being in possession of stolen property. No evidence was offered against the accused beyond that of a Police Inspector, who stated he believed there was a good case against the accused. The Magistrate thereupon held he was precluded from granting bail, and refused the application.

The accused then applied to the High Court for bail, which was granted in the following order :—

HAMILTON, C.J.—The learned Magistrate refused to grant bail in this case, there being a non-bailable offence charged, on the sworn statement of the police officer in charge of the case that he believed there was a good case against the Accused, and on his opposing the application for bail.

The only respect in which a Magistrate's discretion is fettered as regards granting bail in such a case is under Section 497 (1) of the Criminal Procedure Code, by the provision that "an accused person shall not be released on bail if there appear reasonable grounds for believing that he has been guilty of the offence with which he is charged."

I do not think it can be said that the sworn statement of the investigating police officer that he believes there is a good case against the accused can be held to fall within the provisions of Section 497 (1) quoted above. Otherwise the discretion of the Magistrate would be absolutely fettered whenever the Police opposed the granting of bail.

The Magistrate's discretion, in my opinion, is unlimited until he has reasonable grounds for believing himself that the accused person has been guilty of the offence, and these grounds must be founded on something more tangible than the sworn statement of the police officer in this case.

I order the accused to be released on bail in his own recognizances of Rs. 500, and two sureties of Rs. 500 each, to the satisfaction of the Town Magistrate.

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COURT OF APPEAL FOR EASTERN AFRICA.

Before HAMILTON, C.J. (East Africa), MORRIS CARTER, C.J. (Uganda), BONHAM-CARTER, J.

BLOEDOW *Appellant*, orig. *Plaintiff*, *v.*
RENTON *Respondent*, orig. *Defendant.*
COURT OF APPEAL $\frac{2}{1914}$ (May, 1914).

Contract of engagement on terms to be settled later—Parties unable to agree on terms—Incomplete contract—No action for damages.

Renton and Sandmann were partners in a rubber plantation in Uganda. Bloedow agreed with Renton in Uganda to become manager for three years at a salary of £450 a year, further details of his engagement to be settled by Sandmann on his arrival in Europe. Bloedow entered on his duties at once, and his arrival in Europe was delayed for a year. He was unable to agree to terms with Sandmann, who wished him to undertake to open up some 400 acres to cultivation every year. Sandmann refused to have anything further to do with him, and Bloedow thereupon sued Renton for salary from the date he left Uganda, and damages for wrongful dismissal. King-Farlow, Ag. C.J., Uganda, who tried the case, held that the contract was a contingent contract within Section 31 of the Indian Contract Act, that the terms which Sandmann wished to impose were not unreasonable, and dismissed the action.

Bloedow appealed to the Court of Appeal on the grounds that the condition sought to be imposed by Sandmann as to opening up 400 acres was not "a detail," and was in itself unreasonable.

Held :—The contract was a contract with reference to a future contract, and was in itself incomplete, the engagement depending on the agreement as to details. Plaintiff therefore could not sue for its breach.

C. M. Dalal, Major Burn with him, for Appellant.

A. Morrison, for Respondent.

Dalal.—The condition objected to was unreasonable. It could not have been in the contemplation of the parties as a detail. The words of defendant's letter appointing the plaintiff should be

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interpreted against the defendant. He referred to (1) *Burton and Co.* v. *English and Co.*, and (2) *Ward* v. *Ward*. Plaintiff was asked to guarantee an impossible condition as defendant wanted to get rid of him. The Court must not invent terms (see case of (3) *Dallman* v. *King*. Extrinsic evidence should be admitted as to "the details" mentioned in defendant's letter.

Burn.—The stipulation was unreasonable after plaintiff had done a year's work.

Morrison.—There was no complete contract. Sandmann was a principal. He cited (4) *May* v. *Thompson*, and (5) *Vicars* v. *Vicars*. The contract was a contingent contract. He referred to Indian Contract Act, Section 31 (6) *Rossiter* v. *Miller*, and (7) *Hart* v. *Hart*.

Dalal, in reply.—There was a complete agreement, see (8) *Bunville* v. *Jenkins*.

HAMILTON, C.J.—This is an appeal from a judgment of Mr. Justice King-Farlow, sitting in the High Court of Uganda.

The facts, shortly, are that Respondent, who had no special knowledge of plantation work, had interests in an estate in Uganda, together with a Mr. Sandmann, his partner, who is an expert in rubber planting. Respondent desired to turn his estate into a rubber plantation, and being in Uganda in March, 1911, he entered into negotiations with Appellant to act as his manager. The parties had several conversations on the subject, which led up to a final conversation on the 14th March, and on the 21st, Respondent, in writing, offered the Appellant, and the Appellant, in writing, accepted the post of manager for three years at a salary of £450 a year.

The letter of appointment consisted only of two sentences, the first stating the terms mentioned, the second stating that:

> "Further details of your engagement will be settled by Mr. Sandmann on your arrival in Europe."

Circumstances delayed the Appellant proceeding to Europe for a considerable period, during the greater part of which he worked on the estate, and it was not till August, 1912, that he saw Mr. Sandmann in Berlin with a view to settling the "further details." Some exception was taken to the work he had done in

(1) L.R. 12 Q.B.D. 213
(2) E.R. 51, p. 716.
(3) 7 L.J. 6. C.P. 9.
(4) 20 Ch. Div. 705
(5) L.R. IV. Eq. 534.
(6) 3 App. Cases, 1151.
(7) 13 Ch. Div. 670.
(8) 8 Ch. Div. 70.

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the meantime, and Mr. Sandmann required as a condition of his engagement that he should guarantee to open up 400 acres to rubber every year. This he refused to do, and Mr. Sandmann consequently refused to have further dealings with him, and Appellant proceeded to sue Major Renton for arrears of salary and damages for wrongful dismissal.

The view that the learned Judge who tried the case took of these facts was that the letters between the parties of the 21st March formed a complete contract, and that the Appellant was bound to accept any condition of engagement put forward by Sandmann, provided that it was reasonable. He proceeded in consequence to take evidence as to the reasonableness or otherwise of the particular condition objected to by the Appellant, and having come to the conclusion that it was reasonable, he held that Appellant was therefore bound to accept it, and that his non-acceptance of it was tantamount to a dismissal of himself; and he dismissed the action.

The grounds on which the Appellant now seeks to have this judgment reversed are that the objectionable condition was not a detail of engagement, that it was in itself unreasonable, and that certain evidence as to the conversation alluded to in Respondent's letter of the 21st March, 1911, was wrongly excluded, which evidence would have gone to show that such a condition as that objected to was not in the minds of the parties.

On this last point it appears that evidence was admitted, and, I think, rightly admitted, as to the conversation of the 14th March, and it does not support the Appellant's contention, while evidence as to previous conversations appears to have been equally rightly excluded.

The view, however, which I take of the facts differs from that of the learned Judge in the Court below, and if my view be correct no question arises either as to what constituted a "detail" of the engagement or as to the reasonableness or unreasonableness of any such detail put forward by Sandmann.

In my opinion there was here no complete contract on the conversation of the 14th and the letters of the 21st March. But the contract, such as it was, was incomplete, not in the sense that it was a contingent contract, as has been suggested, but it was a contract with reference to a future contract, which the circumstances of the case and the letters themselves show the parties intended to be bound by as being an essential factor in the preliminary agreement, which was not to be binding till these material points were settled. In other words, Respondent said to Appellant, fi you can arrange further details of your engagement with my

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partner beyond the two which I now fix of salary and period of agreement you shall become our manager on those terms. At that time the interview with Sandmann was expected to take place without delay, and it was purely accidental that it was delayed for over a year. The fact that Appellant worked as Manager for a year before the interview took place, and before further details of his engagement were settled no doubt induced him to believe that what Sandmann might suggest when the interview came off could not affect his position as manager, which he had accepted on the 21st March of the previous year. But those further details, nevertheless, still remained to be settled, and until they were settled the contract of employment was incomplete, and Appellant could have no right of action under it for wrongful dismissal till after he had agreed to Sandmann's proposals. The mere fact that no such agreement was arrived at, whether the cause of the disagreement was reasonable or unreasonable, proves the incomplete nature of the contract, and the Appellant was therefore incapable of suing for its breach.

In my opinion the appeal must fail, and should be dismissed with costs.

MORRIS CARTER, C.J.—I concur.

BONHAM-CARTER, J.—I agree that the appeal should be dismissed on the ground that there was no completed contract.

(Appeal dismissed.)

ORIGINAL CIVIL.

Before HAMILTON, C.J.

GABRIEL *v.* MACJOHN. O.C. $\frac{55}{1914}$ (May, 1914).

Debenture deed with power to appoint a Receiver—Contract for sale of property by the Receiver—Receiver agent for the debenture holder—Breach of contract to obtain transfer of liquor licence—Damages—Liquor Ordinance, 12 of 1909, Section 34.

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GABRIEL v. MACJOHN. O. C. 55 1914

The Cabins Restaurant Co. granted a debenture to Defendant as security for advances made by him, one of the conditions being as follows :—

3. At any time after the principal moneys hereby secured become payable the holder of this debenture may appoint in writing any person or persons to be a Receiver or Receivers of the property charged by the debenture, and a Receiver so appointed shall have power :—

(1) To take possession of, collect and get in the property.

(2) To carry on or concur in carrying on the business of the Company, and for that purpose to raise money on the property charged.

(3) To sell or concur in selling any of the property charged by the debenture after giving to the Company seven days' notice of his intention to sell.

A Receiver was duly appointed under the deed, and he contracted to sell the business to Plaintiff, and to obtain a transfer of the liquor licence to his name. He failed to obtain the transfer of the liquor licence, whereby the Plaintiff suffered loss.

Held :—It not appearing from the debenture deed that the Receiver was to act otherwise than as agent for the defendant debenture holder, who was the disclosed principal in the contract for sale the Plaintiff was entitled to sue him, and, the contract not being impossible of performance, to recover damages for its breach.

G. G. Atkinson, for Plaintiff.

A. Morrison, for Defendant..

Morrison.—There was no contractual relation between the parties. The Receiver acted in the sale as agent of the mortgagor. Though Receiver for the debenture holder he was, in fact, agent for the Company. He referred to (1) *Bissell* v. *Aerial Motors*, (2) *Gaskell* v. *Gosling*, (3) *Hobson* v. *Jones*. As regards the transfer of the licence, Irwin was a " holder of a licence " under Section 21 of Ordinance 12 of 1909, and entitled to transfer under Section 34. We did all that was possible to obtain the transfer.

Atkinson.—We have to look at the wording of the debenture, in which the Receiver is not expressed to be agent of the mortgagor. He cited (4)*Deyes* v. *Wood*, and (5) In re *Vimbos*. The Receiver

(1) 27 T.L.R. 73
(2) 1897 App. Cases 575.
(3) L.R. 9 Eq. Cases 459.
(4) 1911 I. K. B. 806.
(5) 1900 1 Ch. 470.

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failed to procure the transfer of the licence, which was not a contract impossible of performance, and we have the right of election to sue either the Receiver or his principal, the debenture holder.

Cur adv. vult.

HAMILTON, C.J.—The Plaintiff in this action sues for £100 for damages for breach of contract.

The facts, shortly, are that the Cabins Restaurant Company granted a debenture to the Defendant to secure the sum of £187 7s. 6d., with interest and charges thereon. Defendant, under the terms of the debenture, appointed his nephew, Mackieof MacJohn, Receiver, and the Receiver on behalf of the debenture holder contracted with Plaintiff to sell him the business and stock-in-trade of the Company, and to obtain a transfer to him of a provisional liquor liicence already granted for the premises to one Irwin.

This liquor licence was provisional to certain structural alterations being made.

The Plaintiff entered into possession on the 2nd February, and at once put in hand the alterations, which were carried out to the satisfaction of the Medical Officr of Health.

The Plaintiff thereupon applied for a transfer of the licence, and on the District Commissioner, a member of the Licensing Board, being doubtful if it could be made, he applied to Defendant's solicitor to obtain the transfer for him as agreed. This the Defendant's solicitor failed to do owing to the Board taking what appears to me to be an incorrect view of the law expressed in Sections 21 and 34 of Ordinance 12 of 1909, under which they held they were unable to make the transfer required, and that Plaintiff would have to wait and put in a fresh application for consideration at the next meeting of the Board in June. As a consequence of this action on the part of the Board, Plaintiff failed to obtain, and has not yet obtained, the licence for the premises, and has in consequence suffered considerable loss.

It has been argued on behalf of the Defendant, on the authority of (1) *Gaskell* v. *Gosling*, that the Receiver was agent for the mortgagor, the Company, and not for the debenture holder, and that therefore there were no contractual relations between the parties.

Having regard, however, to the later cases of (2) *in re Vimbos*, followed in (3) *Deyes* v. *Wood*, I look at the form and wording of the debenture in this case. And nowhere therein does it appear

(1) Supra. (2) Supra. (3) Supra.

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either expressly or impliedly that the Receiver was to act as agent of the Company, or otherwise than as agent for the debenture holder.

I am therefore satisfied that the Receiver was acting as agent for the Defendant as disclosed principal in selling the business to Plaintiff, and that Plaintiff is entitled to sue the Defendant.

The contract was not one impossible of performance or forbidden by law or statute, and the Receiver not having limited himself to using his best endeavours only, which he in fact did, but having contracted to obtain the transfer of the licence, and having failed, the Defendant is liable to indemnify the Plaintiff for the loss he has suffered on the breach of the contract.

The Plaintiff gave his evidence as to the amount of damages in what appeared to me to be a very fair manner, without an attempt to exaggerate his losses, which have been substantial, and which he must continue to suffer so long as the premises remain unlicensed. After considering this evidence and the business with the passenger and visiting population of Mombasa, for which Plaintiff intended particularly to cater, and the evidence as to profits on the sale of liquor, and the loss of actual or prospective customers, both in the sale of liquor as well as of food, and such articles as cigars and tobacco, which naturally go with a restaurant business, I think the figure at which he has estimated his damages is reasonable.

I therefore give judgment for the Plaintiff for that amount, with costs. Judgment to carry interest at 6 per cent. till payment.

(Judgment for Plaintiff.)

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ORIGINAL CIVIL.

Before HAMILTON, C.J., BONHAM-CARTER and EHRHARDT, J.J.

IN THE MATTER OF A REFERENCE BY THE TOWN MAGISTRATE, NAIROBI, IN CIVIL CASE $\frac{871}{1914}$ T.M., N.R.B., DISTRICT COMMISSIONER, NAIROBI, *v.* WALI MAHOMED. O.C. $\frac{66}{1914}$ (June, 1914).

Non-Native Poll Tax Ordinance, No. 19 of 1912—Jurisdiction of Crown to tax subjects in a foreign country—Power of Legislative Council in East Africa to tax subjects of the Crown East Africa Order-in-Council, 1906—Foreign Jurisdiction Act, 1890.

A British Indian resident in Nairobi having failed to pay his poll tax was sued in the Town Magistrate's Court, Nairobi, by the District Commissioner. The point was taken at the trial that the Ordinance was invalid, and by consent of the parties was referred by the Magistrate for the decision of the High Court.

Held :—The Crown has the right to tax its subjects residing in a foreign country where the Crown exercises jursdiction; this right has in the East Africa Protectorate been delegated to the Legislative Council.

O. Daly, for Wali Mahomed.

No pecuniary burden can be imposed without legal authority. The Crown cannot impose taxes without the authority of Parliament. He referred to the English Statutes 25 Ed. I. ch. 12, 3 Ch. I. ch. 1, 16 Ch. I ch. 14, 1 W. and M. ch. 2.

If the Crown has not this power in England, still less has it over its subjects abroad. The Foreign Jurisdiction Acts do not confer authority to tax, nor can Orders-in-Council. The East Africa Order, 1902, purported to give powers to raise revenue, but this provision has been omitted from the subsequent Order of 1906. Revenue can be raised from other sources than direct taxation.

The words "or otherwise" in the recital of the Order-in-Council, 1902, cover the prerogative of the Crown (*See* Halsbury Laws of England).

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DIST. COMMISSIONER, NAIROBI, v. WALI MAHOMED O. C. 66

1914

J. W. Barth, Attorney-General, for the District Commissioner.

"Jurisdiction" in the Foreign Jurisdiction Act, 1890, means "power." See Sections 4 and 16 of the Act. The power, in the Order-in-Council, 1906, to make Ordinances for good government includes the raising of revenue.

The Foreign Jurisdiction Act includes the necessary powers for this purpose.

Daly, in reply.—The Foreign Jurisdiction Act does not confer, but limits the power of the Crown in a foreign country.

HAMILTON, C.J.—The short points for decision in this reference are stated as follows by the learned Town Magistrate, Nairobi :—

> "Whether the King has vested in him a right to levy taxes without the assistance of the Commons on his subjects resident in a foreign country, and whether, if his Majesty has such right, he has delegated the same to the Legislative Council of this Protectorate."

The reference itself and the arguments that have been addressed to us on behalf of the Defendant in the original case have been based on the supposition that the Foreign Jurisdiction Act, 1890, confers jurisdiction on the Crown for the governance of its subjects in a foreign country. East Africa has been held in its relation to the Crown to be a foreign country, and in support of the above contention a quotation from the judgment of Bonham-Carter, J., in the (1) Masai Appeal has been relied on both by the learned Town Magistrate and Counsel for the Defendant. Bonham-Carter, J., no doubt said that "The root of Government of the East Africa Protectorate lies originally in the Foreign Jurisdiction Act, 1890." By this, however, he cannot have intended to convey that the Crown derives its authority from that Act, but that the manner in which the Crown is authorised to regulate the Government of the Protectorate is to be found in the Act, which does not, in fact, confer jurisdiction, but regulates the manner in which the jurisdiction of the Crown in foreign countries, by whatever means acquired, shall be exercised.

Section 1 of the Act provides that :

> "It is and shall be lawful for His Majesty the King to hold exercise and enjoy any jurisdiction" (which by definition includes power) "which His Majesty now has or may at any time hereafter have within a foreign country in the same and as ample a manner as if His Majesty had acquired that jurisdiction by the cession or conquest of territory."

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(1) E.A.L.R. V. 70.

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Now, seeing that His Majesty in fact has power in East Africa, a foreign country, this section appears to me to dispose entirely of the argument that inasmuch as taxation can only be imposed on British subjects within the Realm with the consent of Parliament, that therefore a fortiori British subjects in a foreign country cannot be taxed without such consent.

Parliament has, in fact, authorised the Crown, where it has jurisdiction in a foreign country, to exercise that jurisdiction, subject to the other provisions of the Act, as though it had been acquired by cession or conquest of territory, that is to say, that there are no limits to the exercise of such jurisdiction other than those imposed by the Act.

The main limiting clause of the Act is Section 12, which provides that Orders-in-Council made under the Act shall be void if repugnant to an Act of Parliament extending to British subjects in the foreign country to which the Orders-in-Council apply to the extent of that repugnancy; and as neither the Order-in-Council, 1902, nor the Order-in-Council, 1906, have been shown to be repugnant to any Act of Parliament extending to British subjects in East Africa, they must be considered to be valid, and I have now only to decide whether there is anything contained in those Orders which limits the powers of the Legislative Council of the Protectorate to impose taxation on British subjects.

Article 12 (1) of the Order-in-Council, 1902, authorised the Commissioner "to make Ordinances for the administration of justice, the raising of revenue, and generally for the peace, order and good government of all persons in East Africa."

This was repealed by the Order-in-Council, 1906, which established a Legislative Council, and conferred on it full power subject to His Majesty's instructions "to establish such Ordinances, and to constitute such Courts and Officers, and to make such provisions and regulations for the proceedings in such Courts, and for the administration of justice as may be necessary for the peace, order, and good government of the Protectorate."

It has here been argued that whereas the power to raise revenue has not been specifically repeated in the Order-in-Council, 1906, that therefore the Legislative Council has no power to pass Ordinances imposing taxation. I am, however, of opinion that the Crown having the right to tax, and having delegated to the Legislative Council full power to establish such Ordinances as may be necessary for peace, order and good government, that power covers the right to pass Ordinances for the raising of revenue, by taxation or otherwise, and seeing that the Ordinance in question has not been disallowed, it must be presumed to have been in accordance

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with His Majesty's instructions referred to in Article VII of the Order-in-Council, 1906.

I am therefore of opinion that the answer to be returned by this Court to the learned Magistrate should be to the effect that :—

"The Crown has the right to tax its subjects residing in a foreign country where the Crown exercises jurisdiction; and that such right has been delegated to the Legislative Council of the East Africa Protectorate."

BONHAM-CARTER, J.—I am satisfied that the Government of the East Africa Protectorate has power to tax British subjects resident in the Protectorate. I concur with the judgment of the Chief Justice.

EHRHARDT, J.—This is a reference to the High Court under Section 25 of the Courts Ordinance, 1907, for the purpose of obtaining an opinion on the point whether the Non-Native Poll Tax Ordinance of 1909 is valid or not. That Ordinance has been duly enacted by the Legislative Council of the Protectorate in virtue of the Order-in-Council, 1906. Two points have been pressed upon us—first, that there is no power vested in the Crown by the Order-in-Council to sanction the imposition of direct taxation of British subjects outside the British Dominions; secondly, that if there were such power vested in the Crown, the Order-in-Council of 1906 does not, as a matter of fact, confer any such power on the Legislative Council of this Protectorate.

I do not propose to say more on the second point except that I agree with the Chief Justice that the Order-in-Council, 1906, does confer on the Legislative Council full and complete power to make Ordinances for the purpose of raising revenue as well as generally for the peace, order and good government of the Protectorate.

The first point is, however, of such fundamental importance that I think a few remarks not out of place.

In support of it we have been referred to the Foreign Jurisdiction Act of 1890, and Counsel drew attention to the somewhat limited matters specifically mentioned and referred to in that Act, and pointed out that an Order-in-Council sanctioning the raising of revenue is not included among them. This argument, in my opinion, is based on a misconception of the object, scope and effect of the Foreign Jurisdiction Act of 1890. It must be remembered that until 1843 all foreign jurisdiction was in fact exercised in virtue of the mere Prerogative. In 1843 the first of the Foreign Jurisdiction Acts, which have formed the groundwork of the Foreign Jurisdiction Act of 1890, was passed in order to remove the doubt, in the words of the preamble, as to how far the exercise of the power of the Crown was "controlled by and dependent on the laws and

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customs of this Realm." This Act and the Foreign Jurisdiction Acts that succeeded it did not confer or take away any power or jurisdiction of the Crown. They were explanatory, and established a previous practice on a basis free from doubt. The culminating Act of the Series, the Foreign Jurisdiction Act of 1890, after reciting that "by Treaty, Capitulation, Grant, Usage, Sufferance, and other lawful means the Queen has jurisdiction within divers foreign countries," enacts in its first section that "It is and shall be lawful for Her Majesty the Queen to hold, exercise and enjoy any Jurisdiction which Her Majesty now has or may at any time hereafter have within a foreign country in the same and as ample a manner as if Her Majesty had acquired that Jurisdiction by Cession or Conquest of Territory."

The Jurisdiction referred to in this section is not held by the Crown through the Act, but is recognised by it as having been acquired by the Crown in one or other of the ways recited prior to the Act's applying. By implication this first section enables the Queen to make all such Orders-in-Council as may be necessary from time to time for the purpose of giving due effect to the Jurisdiction or power of which it is possessed, through whatever means, in places outside the British Dominions. Section 12 secures complete freedom of action in the matters that may be dealt with by the Orders-in-Council, for it enacts "that an Order-in-Council, made in pursuance of this Act, shall not be or be deemed to have been void on the ground of repugnancy to the law of England unless it is repugnant to the provisions of an Act of Parliament or of Regulations made under it which extend to British subjects in the country affected by the Order. Counsel has naturally failed to point to any Act of Parliament affecting this Protectorate, or to any Regulations made under such an Act, to which the Order-in-Council of 1906 is repugnant. The Crown, having acquired and exercised for some years general Jurisdiction within this Protectorate, I see nothing to prevent it by Order-in-Council from conferring on the Legislative Council of the Protectorate all the usual powers of legislation as to the administration of justice, the raising of revenue, and generally the peace, order and good government of the Protectorate, which it purports to have conferred in the Order of 1906. Holding as I do that that Order-in-Council entitles the Legislative Council to make Ordinances imposing taxation, direct or indirect, on natives or non-natives, I think that the Magistrate should be informed that in the opinion of the High Court the Non-Native Poll Tax Ordinance of 1912 is valid.

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APPELLATE CIVIL.

Before BONHAM-CARTER and EHRHARDT, J.J.

KESER S/O NARAN *v.* ARANDI D/O RAMJI.
Appellant, orig. *Plaintiff*. *Respondent*, orig. *Defendant*.
C.A. $\frac{18}{1914}$ (June, 1914).

Courts Ordinance, No. 13 of 1907, Section 19—Jurisdiction of Subordinate Courts of First Class—Suits to which no pecuniary value can be assigned not within that jurisdiction.

Held :—A suit between Indians for the restitution of conjugal rights is not within the jurisdiction conferred on Subordinate Courts of the First Class by Ordinance 13 of 1907.

The question of jurisdiction having been raised in the Subordinate Court, the Magistrate held that he had no jurisdiction, and returned the plaint for presentation to the High Court in the judgment following :—

J. SHERIDAN.—In this case the question I have to decide is as to whether a Subordinate Court of the First Class has power to try a case of restitution of conjugal rights between Indians. Mr. Ross contends that I have no jurisdiction on the grounds that my civil jurisdiction is limited in the case of non-natives to suits involving a sum not exceeding Rs. 750, and that a suit for restitution of conjugal rights is of such a nature that one cannot put a valuation on it. He quotes the case of (1) *Aklemannessa Bibi* v. *Mahomed Hatem*, in which it was decided that a Munsif's Court in India, that is, a Court having jurisdiction to try civil cases involving up to Rs. 1,000, had no jurisdiction to try a suit for the restitution of conjugal rights, in support of his argument.

Mr. Burke's argument is that while in India suits for the restitution of conjugal rights are of an unascertained value, a value not being fixed under the Suits Valuation Act, 1887, in East Africa, the value of such suits is fixed by the Court Fee Rules of 1906.

I have considered the arguments of both Counsel and come to the conclusion that my civil jurisdiction in non-native cases is

(1) I. L. R. VIII Cal. 849.

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limited to cases involving sums of Rs. 750, unless the amount be increased to Rs. 1,500, in accordance with the powers contained in the first schedule to the Order.

(2) That a suit for the restitution of conjugal rights, whether between natives or Indians, is not within my jurisdiction, suits between natives being matters for the jurisdiction of the Cadi, and suits between Indians being matters for the jurisdiction of the High Court. I have formed this conclusion, and on the decision of the Judges in the case I have already quoted that a money valuation cannot be put on such suits, and that, further, regarding native cases, the Courts Ordinance, 1907, Section 19, makes special provision whereby the Cadi's Court is to deal with such cases.

(3) Even though the Court Fee Rules of 1906 state that suits of an unascertainable value shall be valued at Rs. 500, nevertheless this provision cannot affect the question of jurisdiction, valuation for purposes of fees being, in my opinion, separate and distinct valuation for purposes of jurisdiction in the absence of express provision to the contrary.

I have looked up previous cases tried in this Court, and seen that before and after 1907 suits for restitution of conjugal rights have been tried in the Town Magistrate's Court, but as far as I can learn from Counsel this is the first time the point of jurisdiction has been taken in this Court.

In returning the plaint for presentation in the High Court I should be glad to learn that Counsel will further argue the question of jurisdiction in that Court if the High Court, of its motion, does not refer the case back to this Court for trial. I allow costs (pleader's), Rs. 40, on the special grounds that this case involved an amount of legal argument. Plaint, as stated, is returned for presentation to High Court.

The Plaintiff appealed.

Burke, for Appellant.

O. Daly, for Respondent.

BONHAM-CARTER, J.—This is an appeal from the Town Magistrate of Mombasa, who has decided that he has no jurisdiction to try a case of restitution of conjugal rights between two Indians. The Town Magistrate has full jurisdiction in all matters in which the value of the subject in dispute does not exceed seven hundred and fifty rupees.

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KESER s/o NARAN v ARANDI d/o RAMJI. C. A 18 1914

It is clear that a suit for restitution of conjugal rights cannot be valued on a monetary basis. It has been held (1) in India that a Munsif with jurisdiction up to Rs. 1,000 cannot try a suit for the restitution of conjugal rights.

In (2) *Shire* v. *Shire*, Lord Brougham said: "Every marriage involves the liabilities insisted on by the Appellant; the status of the issue of the marriage: and that is a right which may be said to be beyond pecuniary value."

And the same Judge in (3) *D'Orliac* v. *D'Orliac*: "It would be quite monstrous to say you might appeal for £1,000 and not for a case where legitimacy is involved."

I have no doubt that the Magistrate was right in holding that the case was one in which jurisdiction was not granted him by the Courts Ordinance. The appeal must be dismissed with costs.

EHRHARDT, J.—This is an appeal from the decision of the Town Magistrate of Mombasa, who returned the plaint in the case for presentation to the proper Court. The action was one for restitution of congujal rights and the learned magistrate held that a money valuation cannot be put upon such suits, and that, as his jurisdiction where Indians are concerned is limited to matters in which the value of the subject in dispute does not exceed Rs. 750, he has no power to try cases in which the subject matter is incapable of valuation. In my opinion the Magistrate was right, and that the only Court which can try cases incapable of a money valuation (other than those allocated to the Cadi's Court) is the High Court. Counsel for the Appellant urged that as the Court Fees Rules prescribe that where the subject matter of a suit cannot be valued it shall be taken to be Rs. 500, that valuation must be taken to be Rs. 500, that valuation must be taken to determine the Court in which such a suit must be brought. This contention is wrong, in my opinion. The jurisdiction of the Courts of the Protectorate is prescribed by an Ordinance, and cannot be affected by a rule made as to Court fees.

It appears to have been the practice for the Town Magistrate to hear and determine such cases. This seems to be the first occasion on which the question of jurisdiction has been raised. Mere practice founded on a misconception is insufficient to give jurisdiction, and forms no ground for disagreeing with the decision of the Town Magistrate in this case.

In my opinion the appeal must be dismissed with costs.

(*Appeal dismissed.*)

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(1) *Aklemanessa Bibi* v. *Mahomed Hatem*, Supra.
(2) V. Moo. 80. (3) IV. Moo. 373.

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CRIMINAL CONFIRMATION.

Before HAMILTON, C.J., and EHRHARDT, J.

REX *v.* KHAMIS BIN SADI. Cr.C. $\frac{223}{1914}$ (June, 1914).

Indian Penal Code, Section 326—Voluntarily causing grievous hurt by dangerous weapons—Hurt caused by unskilful medical treatment.

Held :—Where grievous hurt is caused by unskilled medical treatment the operator cannot be convicted of causing grievous hurt unless it is proved that he did not act in good faith.

A Swahili, having offered to treat a sick child, subjected it, with the consent of its parents, to treatment which caused it grievous hurt without any corresponding good effects. He received a large fee for his services, and the Magistrate convicted him under Section 326 of the Indian Penal Code, and sentenced him to twelve months' rigorous imprisonment. On the sentence being forwarded for confirmation the Court heard the Attorney General in support of the conviction, and passed the following judgment :—

After hearing the Attorney General we are of opinion that the conviction in this case cannot be upheld.

The Accused, with the consent of the child's parents, submitted it to a severe and unskilled treatment, which, having regard to the nature of the child's illness, was not, in fact, calculated to cure it or improve its condition.

The treatment consisted in making incisions in the skin and rubbing in charcoal, and in fumigation. In the course of the fumigation the child received burns, which the Accused says were unintentional.

In the course of this treatment grievous hurt was no doubt caused to the child, but grievous hurt is necessarily caused in many surgical operations, and it cannot be contended that merely because the operator was unskilful he could be convicted, as the Accused has been in this case, under Section 326, Indian Penal Code.

Before a conviction could be held it would have to be proved beyond doubt that the Accused did not act in good faith.

The learned Magistrate does not appear to have considered this point, except in so far as he allowed his opinion to be influenced by

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REX v. KHAMIS BIN SADI Cr. C. 223 1914

the fact that the reward that the Accused received for his services was considerable, and although this might be an element deserving of notice in a chain of evidence establishing bad faith, standing by itself it cannot have any particular weight attached to it.

We therefore reverse the finding and sentence, and direct that the Accused be set at liberty. This is without prejudice to any civil claim that the parents of the child may have against him.

(Finding of Magistrate reversed.)

CRIMINAL CONFIRMATION.

Before BONHAM-CARTER and EHRHARDT, J.J.

REX *v.* MTUINIWARA. Cr.C. $\frac{213}{1914}$ (June, 1914).

Witchcraft Ordinance, No. 9 of 1909--Practising witchcraft for gain—Section 4, Practising witchcraft with intent to injure——Extortion, Section 386, Indian Penal Code.

Held :—The words " for the purposes of gain " govern the whole of Section 2.

The Accused, on general evidence of practising witchcraft, was convicted under Section 2 of the Witchcraft Ordinance, 1909, and also for extortion under Section 386 of the Indian Penal Code, and sentenced to one year's rigorous imprisonment on the first charge and two years on the second.

On the case being forwarded for confirmation of sentence, the High Court heard the Attorney General in suport of the conviction, and passed the following joint judgment :—

This conviction cannot stand; there is no evidence that Mtuiniwara ever practised witchcraft or pretended to use any supernatural power " for the purposes of gain," and these words express the essential element of an offence under Section 2 of the Ordinance, and govern the whole Section, and do not merely govern the words, " holds himself out as a witch doctor."

The alleged practice of Mtuiniwara was to injure by his supernatural power, and this offence is punishable under Section 4 of the Ordinance.

The evidence on the file does not support a conviction under this Section.

The first witness is merely hearsay.

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Second witness testifies to facts which occurred, possibly before the Ordinance, and there is no evidence as to the method and pronouncing of the curse.

Third witness, same remarks apply.

Fourth witness, same remarks apply.

There is no detail as to the curse on the nephew. The witnesses' knowledge may be only hearsay.

Fifth witness does give direct evidence, but there should be detail as to his knowledge of the curse on his sister.

The evidence as to the bag is relevant, but of itself does not warrant a conviction. There is no evidence as to user of the bag.

The Attorney General does not contend that there was any extortion in the case, and it does not appear that an offence has been committed; the acts were not done in order to obtain anything.

There appears to be a general opinion that the Accused is a bad medicine man, and undoubtedly the Magistrate considers him a danger to the country, and there is support for that view. I consider it advisable that the matters should be investigated. The present sentence and conviction are reversed, but I order a new trial by the same Magistrate, and in that trial the Magistrate should charge the Accused under Section 4 if he considers the Accused " of his pretended knowledge of so-called witchcraft has with intent to injure put into operation means he believes calculated to injure anyone." The Magistrate should get as much evidence as possible as to the means and processes.

(Retrial ordered.)

APPELLATE CRIMINAL.

Before BONHAM-CARTER, Ag. C.J., and EHRHARDT, J.

MAX WELTER *v.* REX. Cr.A. $\frac{17}{1914}$ (July, 1914).

Diseases of Animals Ordinance, No. 1 of 1906, Section 14—Movement of cattle without permit—Indian Penal Code, Section 114, abetment—Rules under the Ordinance dated 21st October, 1910, Rule 2, allowing cattle of a native to enter upon land occupied by a non-native.

The Accused, by agreement with a native, permitted the latter to move some cattle from an infected area on to a farm in a clean

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MAX WELTER v. REX Cr. A. 17 1914

area. The farm in question was in non-native occupation, but it was not proved that the Accused was the owner, occupier or lessee. The Town Magistrate, Nakuru, convicted Accused of abetment of an offence under Section 14, Ordinance 1 of 1906, and of an offence under Rule 2 of Rules of 21st October, 1910, made under the Ordinance, and sentenced him to a fine of £100, or, in default, six months' rigorous imprisonment.

Held, on appeal :—Abetment is something more than mere acquiescence; for a conviction on the first count it was necessary to prove that the accused was aware that the native with whom he agreed had no permit to move the cattle.

Held also :—A person who is not proved to be owner, occupier or lessee of a farm in non-native occupation is guilty of the principal offence under Rule 2 of the Rules of 21st October, 1910, if he abets and is present at the commission of an offence under that rule.

G. G. Atkinson, for the Appellant.

H. A. Young, Asst. Attorney General, for the Crown.

The Court delivered the following joint judgment :—

Abetment must be something more than mere acquiescence, and there is no evidence that Mr. Max Welter knew that Mukui had not a permit to move cattle. There is not sufficient evidence on the file to support a conviction for abetment of moving cattle from a dirty Native Reserve; there is no evidence of encouragement or inducement. The conviction on this count cannot stand.

There is very insufficient evidence as to the facts of the places being farms or Native Reserves, and over what boundaries the cattle were moved.

The evidence shows that the owner, occupier or lessee of the farm, of which Mr. Max Welter is alleged to be the owner, has knowingly permitted the cattle of Defendant Mukui, a native, to enter upon and remain upon the farm. An offence against Rule 2 of Rules, 21st October, 1910, has been committed, for which the owner, occupier or lessee of the farm may be punished. On the evidence before it the Court cannot hold that it has been proved that such owner, occupier or lessee was Mr. Max Welter. It has been proved, however, to our satisfaction that Mr. Max Welter abetted that offence, and was present at the abetment, and is therefore guilty of the main offence. Mr. Max Welter has succeeded in getting the verdict reversed on the first count. We therefore reduce the sentence to a fine of Rs. 750 or three months' rigorous imprisonment.

(Findings altered, sentence reduced.)

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APPELLATE CRIMINAL.

Before BONHAM-CARTER, Ag. C.J., and EHRHARDT, J.

ALIBHAI RAMJI AND OTHERS *v.* REX. Cr.A's. 18, 19, 20 OF 1914 COMBINED. (July, 1914).

Indian Penal Code, Section 448—House trespass—Proof of criminal intent essential.

Held :—The fact that a house is is visited in the course of a search for a missing person is not in itself proof of intent to annoy the occupier.

L. W. Ritch, for Appellant.

H. A. Young, Asst. Attorney General, for Crown.

The facts appear sufficiently from the following joint judgment of the High Court :—

The accusation is that the Accused committed criminal house-trespass. The offence must be with an intent to commit an offence, or to intimidate or to insult or annoy any person. There is no allegation that the intent was to commit an offence or to intimidate. But it is alleged by the prosecution that there was an intent to annoy. It is clearly established that the intention of the accused in going to the Complainant's house was to search for his wife. It is not a necessary, or even a usual, result that an enquiry at a house for a missing wife should annoy the occupier of it. There is, in the opinion of the Court, no evidence, either direct or by necessary implication, that the Accused had any intention to annoy. If that element of the charge is not clearly established the charge fails. In our opinion it fails in this case, and the appeal must be allowed and the fine paid by the Accused refunded to him.

Apart from the above consideration, the Court considers the evidence for the prosecution so unsatisfactory and conflicting that a conviction could hardly be sustained on it.

(*Appeal allowed.*)

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ORIGINAL CRIMINAL.

Before BONHAM-CARTER, Ag. C.J.

EX PARTE STANLEY WHITE. O.Cr. $\frac{51}{1914}$ (August, 1914).

Extradition—Fugitive Criminals Surrender Ordinance 1908—Foreign depositions.

Held :—Statements in depositions from a foreign country may be admitted according to the law of evidence prevailing in that country, although the principles of that law of evidence may differ from those of the Law of Evidence in East Africa.

Stanley White, the applicant, was arrested on board the German steamer *Prinzessin* on June 14th as a fugitive offender from Russia, and was brought before the Town Magistrate of Mombasa, who made the following Order :—

"This is an application made on behalf of the Russian Government for the extradition of a Danish subject named Hans Jorgen (Iwan Iwanowitsch) Diechmann, alias Stanley White. The Accused has been remanded by me on different occasions pending the arrival of the *dossier* from Russia. The *dossier* having been received, and the Accused having been brought before me, the following objections to his surrender were made by Mr. Morrison, the Accused's Advocate :—

"(1) No warrant in the ordinary sense of warrant has been received.

"(2) The *dossier* does not disclose any such case against the Accused as would justify my committing him for trial before the High Court, had the crime been committed in the Protectorate.

"(3) The evidence of identification is insufficient.

"Regarding the first point, which Mr. Morrison has referred to as a technical point, it is contended on behalf of the Accused that the present case is differentiated from the case of *Regina* v. *Ganz* (*a*) inasmuch as in that case there was an order of arrest on the file of proceedings, whereas in the present case the Acting Examining Magistrate's disposition merely discloses a determination or decision of the Magistrate to arrest the Accused. I have read the case of *Regina* v. *Ganz* (*a*), and compared it with the

(*a*) 9 Q.B.D., p. 8.

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present case, with the result that I cannot detect any material difference between the two cases on this point. An order for arrest on the copy of the proceedings in that case was construed as tantamount to a warrant authorising the arrest. In the present case, page 2, para. 5, of the Acting Examining Magistrate's disposition contains a similar order in the following words : 'Such application of the said Bluemlein regarding the arrest of Diechmann is to be complied with immediately,' and again, at page 3, para. 6, of the same disposition, the Acting Examining Magistrate expresses himself as follows :—

> "'After this examination the above named Diechmann, according to Art. 419 and 421 of the Statute of Criminal Proceeding, can be absolutely arrested; therefore I have decided to call in the said Diechmann to the investigation according to Sections 1191 and 1681 of Criminal Laws, and before examining him in Russia to arrest him according to Art. 393 Statute of Criminal Proceeding; thereof to issue corresponding dispositions according to Art. 1, point 5 (2), 10, 15, etc., of the convention made with Great Britain on November 12/24, 1886 (Collection of State Laws and Regulations of 1887, No. 29.'

"It cannot be expected that the form of a warrant of arrest in Russia will correspond in detail with our form, but I am satisfied that the *dossier* contains a judicial document giving authority to arrest.

"The second objection must also be discharged on the grounds that the *dossier* contains a sworn and authenticated statement establishing a *prima facie* case of embezzlement against Diechmann. Certain evidence has been admitted by the Acting Examining Magistrate which, according to our law, would be considered hearsay evidence, but the Magistrate in Russia having admitted it, I consider myself bound to accept it, seeing that the *dossier* must be judicially taken notice of by me as part of the evidence. I would gather from the *dossier* that it is the custom to admit both hearsay and secondary evidence in Russia. On the evidence admitted by the Acting Examining Magistrate it is clear to me that a *prima facie* case of embezzlement has been made out. I do not consider it to be within my province to question the correctness of the Russian Magistrate's decision in admitting the evidence he did.

"The following quotation from the Standard Work on Extradition by Sir Francis Piggot, in my opinion, makes it clear beyond doubt that hearsay evidence contained in foreign depositions must be admitted by me. At page 153 the following paragraph occurs :—

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"'The cases decided under Sections 14 do not deal specifically with hearsay evidence, but the language of the judgment is sufficiently comprehensive to warrant this statement, that under that Section the evidence taken abroad, whatever may be its nature, and however it may have been taken, must be admitted.

"'*A priori* considerations already advanced to show the soundness of the rule; and these are reinforced by what has been said above, that the Magistrate is enquiring into the foreign crime, and not into the English equivalent; and therefore no particular hardship is done, if up to the point at which it has already been received abroad, evidence is admitted in accordance with the foreign law. Therefore if a deposition containing nothing but hearsay evidence (very much admitted, I believe, abroad) were put in, and if there were no other evidence tendered, the Magistrate would be bound to admit it.'

"I am satisfied on the third point that the person who was arrested and brought before me as Stanley White is identical with the person Diechmann. The evidence in the *dossier* is that Diechmann sailed in the *Prinzessin* under the name of Stanley White. It contains a full description and photograph of Diechmann, and a man calling himself Stanley White, answering the description in the *dossier*, and bearing a perfect resemblance to the photograph, was arrested and brought before me.

"No evidence has been tendered on behalf of the Accused as to the offence being political, or one for which he cannot be surrendered.

"I commit the Accused to prison on a charge of embezzlement, there to await the warrant of the Governor for his surrender. At the same time I am bound to inform him that he will not be surrendered until after the expiration of such period, being not less than fifteen days, as the Governor may determine, and that he has a right to apply for *habeas corpus* or other like proceedings.

"As regards the property seized by the police when the Accused was apprehended, I have heard both parties on the point, and I make an order that all such property is to remain in the custody of the police for the present, and to be handed up or forwarded in due course to the Russian Authorities, unless an order to the contrary is made by His Excellency the Governor at the time of the surrender of the Accused."

JOSEPH SHERIDAN.

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Stanley White then made an application in the nature of a *habeas corpus* to the High Court of East Africa. The application came on before BONHAM-CARTER, J., when *Morrison* appeared for the applicant, and *Daly* for the Attorney General. The facts appear from the arguments and judgment.

Morrison for the rule.

The matter is governed entirely by the Fugitive Criminals Surrender Ordinance, 1908.

The Magistrate has gone too far in accepting hearsay evidence taken in Russia. There is nothing to show that hearsay is relevant in Russia, and even if it were, "the portions of Russian depositions which are mere hearsay" are not admissible in a Protectorate Court. I quote the text-book of Sir Edward Clarke, 3rd Ed., p. 218: "The general English rules of evidence must be observed. Thus no hearsay evidence, no statements of the prisoner after threats or promises held out to him, could be received." It is true no authority is quoted. Another authority, Sir Francis Piggott, in his "Extradition," allows the "admission of statements made according to the law of evidence prevailing in the foreign country, although the principles of that evidence may differ radically from those on which our law of evidence is based." I submit that Sir Edward Clarke is the sounder authority. Section 512 of the Code of Criminal Procedure, and Section 33 of the Evidence Act are instances of the admission of depositions in criminal cases. Section 165 of the Evidence Act shows how careful the legislature has been to provide for the reception of indicative evidence so that a Magistrate or Judge may find out the truth, and yet to exclude it for the purposes of the judgment. In the case of depositions all that is not evidence should be ruled out. The Court can admit one portion of written evidence and exclude another—*Small and others* v. *Naime and others* (b), *Tupton* v. *Whitmore* (c).

Indian Law Reports show that the same principles apply to written evidence in India. The evidence that can be admitted does not warrant an extradition.

The Russian deposition is not properly authenticated. It is not enough that it should be authenticated in accordance with Russian Law; the authentication must comply with requirements of the Fugitive Criminals Ordinance.

Section 78, Sub-Section 6, of the Evidence Act has not been complied with. The document is a copy, and there is no certificate as to accuracy (Section 85, Evidence Act).

See In re *Counhaye* (d), Ex parte *Percival* (e).

(*b*) 13 Q.B. 840. (*c*) 12 A. & E. 370. (*d*) L.R.8 Q.B. 416. (*e*) 1907 1 Q.B. 696.

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In all proceedings in extradition strictest rules of procedure must be observed the maxim *omnia presumuntur rite et solenniter esse acta* must not be stretched to meet this case.

Daly, for Attorney General.

This Court is not a Court of Appeal, and therefore cannot question the evidence. The extradition order is good if there was any evidence, and if the Magistrate had jurisdiction.

Ex parte *Huguet* (f).

In re *Galway* (g).

R. v. *Maurer* (h).

It is true that the depositions contain hearsay, but since the depositions can be received, their contents can be suceived. Such is clearly the opinion laid down by Sir Francis Piggott in his book. The authentication of the documents is good, since they all bear the Russian Seal—*R.* v. *Ganz* (supra).

BONHAM-CARTER, Ag. C.J.—This is an application by a person calling himself Stanley White, and alleged to be Hans Jorgen Diechmann, for a writ of *Habeas Corpus*, and that he be discharged and his property be returned to him.

This Stanley White was originally arrested as a fugitive offender from Russia, on telegraphic instructions from Nairobi, endorsed by Town Magistrate, Mombasa, on board the German *s.s. Prinzessin*, on Sunday, June 14th, and kept in custody on shore. He was rearrested on June 17th by a warrant under the hand and seal of the Town Magistrate, Mombasa, issued under the authority of the Hon. W. J. Monson, who signed as Deputy Governor of the East Africa Protectorate.

Application was made for his release on the ground that the arrests were illegal, and this application was refused.

The papers did not arrive from Russia for some considerable time, and the prisoner was remanded. The Magistrate heard the case on July 24th, and on June 29th committed Stanley White to prison on a charge of embezzlement, there to wait the warrant of the Governor for his removal.

The prisoner applies to be released on the grounds that the Magistrate had no jurisdiction to make the order for the following reasons :—

(*a*) That no requisition was made for the surrender of the said Stanley White to the Governor by any person recognised by the Governor as a Diplomatic Representative of Russia, but the application was made by His Britannic Majesty's Principal Secretary of State for Foreign Affairs.

(*f*) 29 L.T.R. 42. (*g*) 1896 1 Q.B. 236. (*h*) 10 Q.B.D. 515.

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(*b*) That the order to the Magistrate was not signed by the Governor or Officer administering the Protectorate.

(*c*) The arrest on the German *s.s. Prinzessin* was illegal.

(*d*) No evidence that Diechmann had committed embezzlement or that Diechmann was Stanley White.

(*e*) No foreign warrant under Section 8 of the Ordinance produced to the Magistrate.

(*f*) The Provisional Authorisation of the Magistrate to arrest and the subsequent arrest were illegal, as they were issued without any evidence on oath.

(*g*) The translation of the Russian Proceedings was not verified on oath, and should have been rejected, and the copies of the Russian Proceedings are not duly authenticated.

(A) As to the first point, there is no Diplomatic Representative of Russia in East Africa, and the requisition was made by the Russian Ambassador in England to the Secretary of State for the Colonies, and from him transferred to the Governor. I consider that this was a requisition made to the Governor by a Diplomatic Representative through the Secretary of State, and, as such, the correct procedure where there is no Diplomatic Representative in this Protectorate.

(B) The order to the Magistrate was signed "W. J. Monson, Deputy Governor," and the Court recognises that the person signing as Deputy Governor has a right to do so, and that as he can have been invested with the powers of Administering the Protectorate subject to two exceptions, when he signed the requisition he was so invested.

(C) As regards the arrest on the *Prinzessin*. In common law I have no doubt as to the right of a Power to arrest on board a foreign merchant ship lying in its territorial waters. It has been argued that Section 19 of the Fugitive Offenders Ordinance makes every vessel of any Foreign State part of such Foreign State. I think that the words "for the purpose of this Ordinance" in the Section mean for the purposes of the applying power under the Ordinance, and do not alter the powers of arrest of this Government on Foreign Vessels in the Ports of the Protectorate.

(D) On the ground that there is no evidence that Diechmann had committed embezzlement. The only evidence is the file of papers sent from Russia. The file consists of :—

1. A photograph.
2. A "disposition" that the Magistrate has decided to recognise the Russian Vacuum Oil Company as Civil Plaintiff in this case.
3. An oath by Otto Blumlein.

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EX PARTE STANLEY WHITE. O. Cr. 51 1914

4. A "Deposition" to arrest Diechmann.
5. Copy of Protocol which is the evidence on which the Magistrate decided to arrest, and consists of the sworn statement of Otto Blumlein.

This statement is not a statement which is in any form like an English statement, and the evidence that is allowed in it would to a very great extent be disallowed in this country. Not that the facts alleged to be proved are irrelevant, but that the method of proving them is not the method allowed in English law.

Counsel for the prisoner has pointed out that much is hearsay and much not the "best" evidence. I am not cognisant of the Law of Evidence in Russia, but I presume that the Magistrate who took the depositions was, and that the deposition was taken correctly according to Russian Law.

I have had no authority quoted to me, and I am unable to find one, and the two text books I have had given me as authorities are in direct conflict as to this question, but I am of opinion that the evidence as admitted by the Magistrate must be taken to have been correctly admitted, and, if correctly admitted, I am of opinion that there is evidence that Stanley White is Diechmann and did commit embezzlement, and therefore on that ground I have no right to decide that the Town Magistrate was wrong.

(E) As regards the Foreign warrant, there is a duly authenticated copy of a decision of the Magistrate to arrest, and upon the authority of *R.* v. *Ganz* (supra) I am satisfied that such a document fulfils the requirements of Section 8 of the Ordinance, and is what is there called a "foreign warrant." It is clear that the foreign warrant need not be in the shape or form of an English warrant.

(F) The Magistrate should have complied with Section 6 of the Fugitive Offenders Ordinance, and I am of opinion that without any evidence the warrant was wrongly issued. That, however, does not affect the matter at this stage.

(G) The documents are all sealed with the Russian official seal and authenticated by a Minister, and also authenticated by the British Consul. The authentication appears to be all that is required. For the above reasons I dismiss the rule.

I do not consider that under these circumstances and on this application I can make any order as to the property found on the prisoner.

Daly, for costs.

BONHAM-CARTER, J.—This is a case which is of a criminal nature, and it has not been the practice of this Court to allow costs in such cases. I therefore make no order as to costs.†

† Reported by BONHAM-CARTER, J.

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APPELLATE CIVIL.

Before EHRHARDT, J.

MEGHJI LADHA & Co. *v.* 1. KHIMJI PACHAN AND
Appellants, orig. *Plaintiffs*. 2. J. A. DOKELMAN.
Respondents, orig. *Defendants*.

C.A. $\frac{16}{1914}$ (August, 1914).

Indian Contract Act, Section 178—Pledge of bullocks hired—Delivery—Possession of Pawnor—Indian Contract Act, Section 108.

Khimji Pachan hired from Plaintiffs certain bullocks and carts, which he purported to pledge to J. A. Dokelman as security for an advance. Khimji Pachan was to use the pledged bullocks and carts in connection with work he was carrying out for J. A. Dokelman.

Held:—1st, That the delivery to J.A.D. was sufficient to establish a valid pledge, and 2nd, that under Section 178 of the Indian Contract Act the pledge to J. A. D. was valid.

Ross, for the Appellants.
Macrae for the Resporent, J. A. Dokelman.

The judgment of the Subordinate Court was as follows :—

G. H. PICKERING.—The second Defendant in this case has given evidence of an act by the first Defendant delivering over to his possession as pledge for Rs. 300 the two carts and four oxen the subject of this suit. It is true that the receipt Exhibit 3 is against the second Defendant in that no security is mentioned, but on the 28th November the second Defendant is found in possession of the oxen and carts, and holding them as against the Plaintiff. After the advance to him the first Defendant was to use the oxen, but this was in doing the foundation work under his contract with second Defendant. I find that there was a pledge of the oxen and carts to the second Defendant as security for Rs. 300. Whether this is a good pledge depends upon the application of Section 178, Indian Contract Act. The construction of this section is of great importance, since it and Section 179 represent the whole of the substantive law on this point. As far back as 1873, in the case of *Greenwood* v. *Halquette*, the Bombay Courts decided that "possession" in Section 178 must be read in a manner qualified as in Section 108 of the same Act. Unfortunately the report of that case in 12 B.L.R. is not in the library here. This case has, however, been dissented from in a recent case in the Punjab

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Courts, 1902, Punjab Rec. No. 34, *Abdulhassan Khan* v. *Ranjilal* Here it was decided that the pledgor, who was in possession of a piano under a hire purchase agreement, made a valid pledge of the piano. The Punjab Court refused to follow *Greenwood* v. *Halquette*. The earlier case, however, was followed by the Madras Court in the case of *Nagonda Dávay* v. *Bavu Chattian*, 27 L.R. Madras 424. Sir Frederick Pollock clearly does not approve of this decision, since he states in a footnote, "yet surely the hirer (of the jewels) has possession and not bare custody." The same authority also approves of the Punjab decision in his book on the Contract Act, 2nd edition. I am of opinion that the Madras case of 1904 is clearly bad law. One of the most elementary rules of the construction of statutes is that where parallel sections are found to differ in phrasing, that difference must be taken to have been intended by the legislature. It is clearly not the duty of a Court to say of the Contract Act that the words, "by the consent of the owner," and "notwithstanding any instructions of the owner to the contrary," which appear in Exception 1, Section 108, should be read into Section 178, although they have been omitted from the latter section. I therefore refuse to follow the case of *Greenwood* v. *Halquette*. I find that this pledge was a good and effective contract and is enforceable against the Plaintiff. There is no evidence of any tender. I therefore dismiss the suit with costs.

This judgment was upheld by the High Court on appeal in the following judgment :—

EHRHARDT, J.—In this case counsel for the appellant has ingeniously raised two interesting points of law. The facts are as follows :—The first Defendant hired from the Plaintiff certain bullocks and carts; he obtained an advance from the second Defendant, and as security purported to pledge the bullocks and carts. The first Defendant was at the time engaged in building some foundations for the second Defendant, and it was intended that he should continue to use the bullocks and carts. After obtaining the advance the first Defendant disappeared.

The first point raised is that no pledge was made by the first Defendant because there was no such delivery of the goods to the second Defendant as is necessary to constitute a bailment, inasmuch as the first Defendant was still to be allowed to use the bullocks and carts. I cannot, however, see why the pawnee of the goods should not, if it suits his purpose, allow the pawnor to use them. Permission to do so is revocable, and does not, in my opinion, change the character of the bailment between the parties. The first Defendant, after the security had been given, held the goods, not for himself, but for and on behalf of the second Defendant.

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The second point raised is that under Section 178 of the Indian Contract Act the first Defendant could not make a valid pledge of the bullock and cart. That section lays down that a person who is in possession of any goods may make a valid pledge of such goods, provided that the pawnee acts in good faith, and also provided that possession has not been obtained by an offence or fraud. The section is an application of the principle that if one person puts another into possession of his goods he must suffer the loss which is caused by any abuse of that possession. This principle, in my opinion, is not based on any assumption that the first person is guilty of any negligence or want of precaution, but is adopted as being as equitable as any principle can be under the unfortunate circumstances, and at the same time the one which is least likely to disturb security or hamper commercial transactions. The proviso as to fraud or offences is necessary to prevent the principle encouraging crime or fraud.

On the face of the section it would seem to be clear that the first Defendant, being in possession of the goods without fraud or offence, could make a valid pledge. But it is pointed out that under Section 108 a person in possession of goods, not being the owner, can only validly sell goods if his possession is firstly " by the consent of the owner," and secondly, if it is such that the owner may give instructions to the possessor. It is contended that the word " possession " in Section 178 must be used in the same sense as in Section 108. It would follow from that that as the owner of the bullocks and cart could not give instructions to the first Defendant the first Defendant had not such possession as would enable him to make a valid pledge. After considering Section 108 and reading such authorities on its interpretation as I can get, I feel very doubtful whether the current interpretation is quite correct. I am inclined to think it at least arguable that the power of the owner to give instructions is not a necessary ingredient of the kind of possession contemplated. But if it is, it is only by implication from the words expressly added in that section, " notwithstanding any instruction of the owner to the contrary." Those words are not to be found in Section 178, and I see no reason for importing them into it. That being so, I am of opinion that the first Defendant was in a position to make a valid pledge.

As to the third ground of appeal, I can see no circumstances in the transaction which should have induced the second Defendant to infer that the first Defendant was acting improperly.

The appeal is dismissed with costs.†

(Appeal dismissed.)

† Reported by EHRHARDT, J.

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ORIGINAL CIVIL.

Before EHRHARDT, J.

MOOLLA MAHOMEDALI ALIBHAI *v.* KHOJA GULAMHUSSEIN VIRJI.

O.C. $\frac{60}{1914}$ (September, 1914).

Valuation of suit in action by lessor to recover immoveable property from lessee withholding possession—Practice where amount of rent due does not exceed limits of jurisdiction of Town Magistrate—Action wrongly brought in High Court.

A portion of a house in Mombasa, valued at Rs. 1,800, was let by M. to G. on a monthly tenancy of Rs. 20. M. gave notice to quit, but G. refused to give up possession. When five months had elapsed after the notice to quit, M. sued G. in the High Court for recovery of possession and for use and occupation for five months.

Held :—The title to the property not being in issue and the amount of arrears of rent being within the jurisdiction of the Town Magistrate, the action should have been brought in the Town Magistrate's Court.

G. G. Atkinson, for Plaintiff.

L. W. Ritch, for Defendant.

EHRHARDT, J.—In this case the Plaintiff is suing for the recovery of premises which were let to the Defendant on a monthly tenancy at a rental of Rs. 20 a month. The ownership of the Plaintiff, the monthly tenancy and the amount of the rent are all admitted. The point has been taken that this action should have been brought, not in the High Court, but in the Town Magistrate's Court, as being the Court of the lowest grade competent to try it (*v.* Section 15 of the Civil Procedure Code). The Plaintiff has taken the capital value of the premises sought to be recovered as determining the valuation of the suit for the purposes of jurisdiction. But in my opinion the capital value is irrelevant in this case. There is no question as to the Plaintiff's proprietary rights in this case. What he is seeking to recover in this case is not the ownership, but the usufruct of the property. The value is, in my opinion, some portion or multiple of the annual rental or value. As the amount to be recovered in this case is only some few month's rent, the Town Magistrate's Court is clearly competent to deal with it.

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I have enquired into the practice of the Courts here and find that this ruling is consistent with it. Several actions of this character have been brought and determined in the Town Magistrate's Court during the last two years. It is true that several have also been brought in the High Court; but I found that one of these was properly brought, as the annual value was over Rs. 2,400. The others were settled before the point could be raised and argued. It must be remembered that it is for the Plaintiff to put a value on the subject matter of an action subject to the condition that if he over values it he will only be entitled to recover costs on the lower Court scale.

I decide that this action should have been instituted in the Town Magistrate's Court, and order the plaint to be returned to be presented to that Court.

Plaintiff to pay costs.

(*Plaint returned.*)

ORIGINAL CIVIL.

Before EHRHARDT, J.

LALJI JINA *v.* MRS. WEBBER. O.C. $\frac{103}{1914}$ (Sept., 1914).

Service on agent.

L. having bought a house for W., W. opened the house as a boarding establishment, and put F. in charge as manageress. A dispute having arisen on the payment for the building contract, L. filed an action against W., who was residing out of the jurisdiction, and service of the summons was effected on F., who objected that she was not an agent of W. for service of the summons.

Held:—The contract for building the house having nothing to do with the management of the boarding business, service on the manageress was ineffectual.

L. W. Ritch, for Plaintiff.

A. Morrison, for the person served.

EHRHARDT, J.—In this case the Plaintiff is suing a lady who is at the present time resident out of British East Africa. The

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LALJI JINA v. MRS. WEBBER. O. C. 103 1914

Plaintiff alleges that he agreed to build a house for the Defendant for Rs. 9,500, of which he has received Rs. 9,000, and that he did extra work in connection with the house to the value of Rs. 1,020/87, of which he has received nothing. The house which the Plaintiff built for the Defendant is being used as a boarding house by the Defendant, and there is another lady, a Miss Fairhurst, at present in charge of it. Being unable to serve the Defendant personally, the Plaintiff has served Miss Fairhurst, as the manager or agent who personally carries on the business of the Defendant. The question has arisen whether that service is effectual.

Service should, if practicable, be either personal or on an agent empowered to accept service (Section 75 of the Civil Procedure Code). By Section 76 of the Procedure Code, however, it is provided that "in a suit relating to any business or work against a person who does not reside within the local limits of the Court from which the summons issues, service on any manager or agent who at the time of service personally carries on such business or work for such person within such limits, shall be deemed good service." For this Section to apply, three conditions must be fulfilled: (1) there must be a suit against a defendant who is out of the jurisdiction, (2) that defendant must have within the jurisdiction a manager or agent who is carrying on business for him, and (3) the suit must relate to the business which is being carried on by the manager or agent.

The last condition is most important. Unless the suit relates to the business of which the agent sought to be served is manager, such agent is not in a position to know what defence his principal may have to the action. Obviously great injustice might be done by allowing service on a person who is not cognisant of all the circumstances of the case. In order that this section may apply the suit must, in my opinion, relate to a matter which forms part of the connected course of transactions which make up the business of which the person sought to be served has been appointed manager.

In this case the suit relates to the building of a house and extra work in connection with it. The house is being used as a boarding-house for the Defendant. The contract to build the house does not, in my opinion, form part of the business of running the boarding-house. The boarding-house business did not come into existence until after the house was completed. The Defendant may have many defences of which her manager is unaware.

I hold that the service on Miss Fairhurst is ineffectual in this case.

Plaintiff to pay Miss Fairhurst's costs.

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APPELLATE CIVIL.

Before EHRHARDT, J.

SULEMAN BIN ABDALLA *Appellant*, orig. *Defendant.* *v.* GOKALDAS MURARJI (per KHIMJI DAMODAR). *Respondent*, orig. *Plaintiff.*

C.A. $\frac{26}{1914}$ (September, 1914).

Action brought by Attorney for Plaintiff—Description of Plaintiff in Plaint—Objection taken too late.

No objection having been taken at the trial to the description of the Plaintiff in the plaint:

Held:—That it was too late to take such objection on appeal.

Ritch, for Appellant.

Byron, for Respondent.

EHRHARDT, J.—As to the technical point that the Plaintiff is not correctly stated in the plaint, I hold that the Appellant is too late in taking the objection. If it were necessary I should be prepared to hold that the description of the Plaintiff is adequate, and that the Defendant has not been prejudiced by its reading "Kimji Damodar for Gokaldas Murarji" instead of in the more usual manner, "Gokaldas Murarji by his attorney Kimji Damodar." I am of opinion also that the wakala of Kimji Damodar was sufficient authority for him to commence the action.

So far as the appeal relates to the merits I am of opinion that the case was carefully tried, and I see no reason to disagree with the Magistrate in his findings.

The appeal is dismissed with costs.†

(Appeal dismissed.)

† Reported by EHRHARDT, J.

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ORIGINAL CIVIL.

Before EHRHARDT, *J.*

BESSON & CO. *v.* WALJI BHANJI & CO.
O.C. $\frac{114}{1914}$ (October, 1914).

Civil Procedure Code, ch. XXXIX—Application for leave to defend in order that decree may be made for payment by instalments.

The Plaintiffs sued the Defendants on a negotiable instrument under ch. XXXIX of the Civil Procedure Code. The Defendants applied for leave to appear and defend on the ground that the decretal amount should be made payable by instalments, for reasons disclosed in an affidavit.

Held:—That if grounds are disclosed for considering it just and equitable that the form of decree usual in actions under ch. XXXIX of the Civil Procedure Code should be varied the Court may grant leave to defend.

Dalal, for Defendant.

Decrees under ch. XXXIX are not exempt from Section 210 of the Civil Procedure Code.

Atkinson, for Plaintiff.

Ch. XXXIX, read as a whole, implies that Section 210 shall not apply. Leave to appear should only be granted where there is a defence—not a plea for mercy.

Dalal, in reply.

EHRHARDT, J.—This is a summary suit on a negotiable instrument under Chapter XXXIX of the Civil Procedure Code. The Defendants admit the claim, but urge that under the peculiar circumstances mentioned in the affidavit filed an order should be made for the payment of the decretal amount by instalments. In order to satisfy myself as to the reasonableness of the Defendant's request, and in order to give the Plaintiff an opportunity of opposing it, I gave the Defendant leave to appear and defend.

It is contended on behalf of the Plaintiff that the Court has no power to order payment by instalments in these summary suits. The words of Section 210 are very wide and general. "In all decrees for the payment of money the Court may for any sufficient reason order that the amount shall be paid by instalments, with or

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without interest." The discretion vested in the Court by this Section is expressly declared to apply to all decrees for the payment of money. If it was intended to exclude from this discretion decrees based on negotiable instruments one would expect very clear and express provision to that effect. There is no such express provision in the Code, but counsel for the Plaintiff argues that the exclusion is a necessary implication from the provisions of Chapter XXXIX, which in the procedure laid down by it supplies no opportunity for the Court to exercise that discretion. I do not agree with that contention. I think that Section 533 is wide enough in its terms to give the Court power to grant a defendant leave to appear and defend whenever facts are disclosed which make it appear possible that the decree should in justice not issue in the form to which the plaintiff would be entitled in the absence of such leave to defend. The case of (1) *Roulet* v. *Fetterle* shows that leave to appear and defend is not confined to cases in which the defendant discloses a defence to the action. In that case leave to appear and defend was granted because the defendant claimed to have the decretal amount reduced by compensation for wrongful arrest under Section 491. The position of the defendant there was closely analagous to that of the defendant here. He came and asked for leave, not because he had a defence, but because the Court has a discretion when making a decree of ordering compensation under Section 491. Here the Defendant asks for leave, not because he has a defence, but because the Court making the decree has a discretion of ordering payment by instalments under Section 210.

I hold that where the defendant shows *prima facie* that the case is one in which the Court should exercise its discretion and order payment by instalments, the Court may, and should, give leave to appear and defend.

Counsel for the Plaintiff referred to the fact that the executive have not proclaimed a moratorium. It seems to me quite probable that in coming to this decision they took into account the fact that the Court is invested with the discretion conferred by Section 210, by which it can prevent its decrees being used oppressively. In this time of uncertainty, with trade dislocated and business impeded, this discretion may have to be exercised more frequently than in normal times. But that proves its value, which would be greatly impaired if claims on negotiable instruments were excepted from its operation.†

(*Leave to appear and defend granted.*)

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(1) *Roulet* v. *Fetterle* (18 Bombay, 717).

† Reported by EHRHARDT, J.

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APPELLATE CIVIL.

Before EHRHARDT, J.

HABIB NANJI & CO. *v.* HAJI KASSAM & SONS.
C.A. $\frac{31}{1914}$ (October, 1914).

Practice—Endorsement of service on summons not proof of service —Where service not disputed evidence of process server unnecessary—Sale of goods on credit—Action brought before time of credit expired.

Held :—Where a defendant did not dispute service of summons, but failed to appear at the hearing, and judgment was given against him *ex parte*, it was not open to him thereafter to allege that service upon him was not proved.

Held also :—Where goods are sold against a bill to be given, and the bill is not given, the seller cannot sue for the price of the goods before the expiration of the agreed period of credit.

G. G. Atkinson, for Appellant.

L. W. Ritch, for Respondent.

EHRHARDT, J.—This appeal raises two interesting points—one of practice, the other of law. The Plaintiff in this case issued a writ which, according to the memorandum endorsed on the back of it was served on the Defendant on the 8th September last. The case came on for hearing on the 16th September, when the Defendant failed to appear. The Town Magistrate, following what I understand is the invariable practice of the Courts of the Protectorate, accepted the memorandum endorsed as proof that the Defendant had been duly served, and proceeded to hear the case. It is now contended that the memorandum is not legal evidence. It is quite clear from numerous decisions, of which I will only refer to (1) *Shah Koondun Lall* v. *Noor Ali*, that if the service is disputed the memorandum is not legal evidence, and the service will have to be proved by producing the process server. In this case, however, the fact of service is not disputed. The Appellant does not allege that he was not served. In the absence of any such allegation I do not think he can succeed on this point. The

(1) 10 W. R. p. 3.

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memorandum has always been taken as *prima facie* evidence when there is no reason to doubt its correctness. It is made by the process server in pursuance of a statutory direction, and is corroborated by the signature or mark of the person served. Unless the service is disputed it is for the convenience of parties that the memorandum should be acted on, and even if the practice is not quite correct. I regard the acceptance of the memorandum as proof of service under the cricumstances of the case as a mere irregularity not affecting the merits of the case. Such an irregularity does not supply a sufficient ground of appeal, and I hold that the appeal fails so far as that ground is concerned.

Having held the service proved, the Town Magistrate took the evidence of a partner in the plaintiff firm. That witness deposed to the effect "that he sold goods for Rs. 136/33, that the Defendant was to give a promissory note payable after 150 days, that the Defendant did not give it, and that it was demanded before action." On this evidence the Town Magistrate gave judgment for the Plaintiff. It is contended for the Appellant that the Magistrate should have dismissed the action. I agree with that contention. It is established by the case of (1) *Mussin* v. *Price* that if goods are sold and delivered on the terms that the purchaser is to give a bill payable after an agreed time, and the purchaser fails to give the bill, the vendor cannot at once bring an action for goods sold and delivered, but must wait until the termination of the time during which the bill had to run or else sue on the promise to give the bill. Applying that principle to this case, the Plaintiff cannot sue for goods sold and delivered until 150 days from August 4th have expired. I allow the appeal, and give judgment for the Appellant with costs.

(Appeal allowed.)

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(1) 4 East. p. 147.

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APPELLATE CIVIL.

Before EHRHARDT, J.

HASSANALI JIVANJI *v.* J. LACLEF.
Appellant, orig. *Defendant*. *Respondent*, orig. *Plaintiff*.
C.A. $\frac{32}{1914}$ (November, 1914).

Form of judgment not in accordance with provisions of Civil Procedure Code—Goods bailed for transport and not delivered—Onus of proof—Adjournment refused by Magistrate.

The Plaintiff delivered certain boxes to the Defendant to be transported to Tiwi. One of the boxes went astray, but was subsequently recovered and delivered. It had been broken open, and most of its contents stolen.

Held :—That the onus of proving absence of negligence was on the defendant.

Ritch, for Appellant.

Atkinson, for Respondent.

EHRHARDT, J.—The first ground of appeal in this case is that the judgment is no judgment in accordance with the provisions of the Civil Procedure Code. The judgment reads : " I give judgment for the sum of Rs. 300 and costs to scale." That judgment clearly does not comply with the provisions of the Civil Procedure in that it does not give a concise statement of the facts, the points for determination, the decision thereon, and the reason for such decision. This circumstance, however, does not of itself constitute a ground of appeal. If any useful purpose were to be served thereby the judgment might be sent to the learned Magistrate to be put into proper form. But the learned counsel for the Appellant does not apply that this should be done. The whole record of the case is very short, and from it can be readily gathered the points decided by the Magistrate and the reason for his decision. The clear and ample arguments of the learned counsel on both sides show that they have been in no way hampered by the summary statement of the Magistrate's decision. They have had no difficulty in ascertaining and dealing with all the points that are implied in that short statement.

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The second ground of appeal is that the judgment is wrong in law. The facts of the case are as follows :—The Plaintiff delivered certain boxes to the Defendant, who undertook for hire to transport them to Tiwi. One of those boxes went astray, but was subsequently recovered and delivered. It had been broken open and most of its contents stolen. The Plaintiff contends that the condition of the box is evidence of negligence on the Defendant's part, and that the Defendant is liable to make good the loss. The principle applicable to this case is, in my opinion, that stated by Strachy, C.J. in (1) *Rampal Singh* v. *Murray and Co.* "If the damage caused (to goods bailed) were such that in the ordinary course of events it would not happen to goods of the kind in question if used with ordinary prudence, then I think it would be for the hirer to prove that he had exercised such prudence; otherwise I think the owner must give some evidence of negligence." Applying that principle, I think the onus of showing the absence of negligence was on the Defendant in this case. Similarly it has been held in (2) *Trustees of the Hrbour, Madras*, v. *Best and Co.* that where goods delivered for safe custody for reward are lost while in the possession of the bailee the burden lies on the bailee to prove absence of negligence on his part. No distinction can, in my opinion, be drawn in this respect between goods bailed for safe custody and goods bailed for transport. In the absence of any evidence by the Defendant negativing negligence I hold that the Plaintiff was entitled to succeed, and the Magistrate's decision was right.

The third ground of appeal is that the evidence of the Plaintiff proves nothing against the Appellant. I cannot agree with this. On the contrary, I hold that the evidence proves the facts I have stated in dealing with the second ground of appeal. The fourth ground of appeal is that the Magistrate erred in not granting an adjournment. Counsel for Appellant pressed this point with some vehemence and persistence. It appears that when the case came on for hearing on September 4th last the Defendant appeared by his counsel, Mr. Morrison, and an application for adjournment was made. The only reason given in support of the application was that the Defendant was in charge of his shop at Gazi. The learned Magistrate, in the exercise of his discretion, held that no sufficient reason for an adjournment had been shown, and refused the application. I should be very reluctant to interfere with the exercise of a Magistrate's discretion to deal with adjournments in

(1) I.L.R. XXII. All. 164.
(2) I.L.R. XXII. Mad. 524.

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HASSANALI JIVANJI v. J. LACLEF. C. A. 32 1914

any case, but in this case I quite approve of and uphold the Magistrate's decision. Since the trial the Defendant has filed an affidavit in which he tries to form some sort of connection between his failure to attend the Court on September 4th and the presence of Germans at Gazi. In my opinion no such connection is made out, and there is nothing to induce any other belief than that the only reason why the Defendant did not attend was that it did not suit his personal convenience to do so. That is, of course, no reason for granting an adjournment. The personal convenience of parties must be subordinated to the convenience of the Court, otherwise the Court, the counsel appearing before it, litigants, witnesses, and the general public will be put to endless inconvenience.

The fifth ground of appeal, that no issues were framed, was not supported by any argument, and I hold that it does not under the circumstances of the case constitute a valid ground of appeal.

I dismiss the appeal with costs.†

(*Appeal dismissed.*)

Reported by EHRHARDT, J.

APPELLATE CIVIL.

Before BONHAM-CARTER, Ag. C.J.

JADAVJI DHANJI & Co. *v.* JOHN MACKINNON.
Appellants, orig. *Plaintiffs*. *Respondent*, orig. *Defendant*.
C.A. $\frac{30}{1914}$ (November, 1914).

Contract containing arbitration clause—Action brought without reference to arbitration—Stay of proceedings.

J. D. and Co. were engaged on a building contract by M. A dispute arose between them as to the amount payable on the architect's certificate, and J. D. and Co. sued M. in the Town Magistrate's Court. The contract contained a clause providing for the reference of disputes to arbitration. J. D. and Co. not having first availed themselves of this clause, the Magistrate dismissed the suit.

***Held on appeal*:—The suit should not have been dismissed, but a stay of proceedings should have been ordered.**

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A. C. Ross, for Appellants.

A. F. Macrae, for Respondent.

BONHAM-CARTER, Ag. C.J.—This is an appeal from the decision of the Town Magistrate of Nairobi dismissing a suit owing to it not having been submitted to arbitration.

There was a contract to build a house, which house was completed about April, 1913.

Clause 23 of the Agreement contained: "PROVIDED ALWAYS that in case any dispute shall arise between the Employer or the Architect on his behalf and the Contractor the matter in dispute shall be referred to an Arbitrator."

Clause 21: "Payments to the Contractor will be made from time to time upon the Certificate of the Architect as the work proceeds at the rate of 75 per cent. of the value of the work executed in position in sums of not less than Rs. 1,000. Seven per cent. of the contract price will be retained for six months as a security of any defects that may become obvious in that time."

The Architect issued on October 31st a Certificate for Rs. 335, or approximately 7 per cent. on the whole amount.

The certificate has on it printed in large type, "WITHOUT PREJUDICE." I am not able to attach any meaning to these words. The document is either a certificate or not a certificate, and it is clearly intended to be the former, and if so, the words "without prejudice" are unmeaning and valueless.

This amount has been disputed by the employer. There is nothing in the Agreement which makes the Architect's Certificate final, and a dispute has actually arisen. I am satisfied that there is a dispute which should have gone to arbitration. Under these circumstances I order the action to be stayed until the matter has gone through the arbitration stage. The Magistrate's order is varied from a dismissal to a stay, but the main facts are the same. Appeal dismissed with costs.

(Appeal dismissed.)

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APPELLATE CIVIL.

Before BONHAM-CARTER, Ag. C.J.

OLE OLOSO *v.* NALULUS OLE KIDOKI.
Appellant, orig. *Defendant*. *Respondent*, orig. *Plaintiff*.
C.A. $\frac{21}{1914}$ (November, 1914.)

Tribal custom among the Masai—Ownership of cattle by community of tribal clan.

Held :—**A Moran wishing to leave his tribe cannot take with him communal cattle.**

The parties appeared in person before the Officer in charge of the Masai Reserve, who gave the judgment following :—

R. W. HEMSTED.—In this case the Plaintiff, a Moran of the Ol Damat tribe, claims 14 head of cattle and 2 donkeys, which the Defendant, a Mzee of the Purko tribe, says belong to him, and are now in the village of the Kisaruni Purko Muran.

It appears that many years ago the Purko and the Ol Damat fought, and the latter were practically annihilated. A few escaped and found refuge with other tribes, but the majority lost all their stock and threw themselves on the mercy of their conquerors.

The man, Sanguk Ole Kidoki, the brother of the Plaintiff, went to live with the Defendant, and took some of his family, including Plaintiff, with him. Sanguk was then a Moran, and took part in various other wars waged by the Purko, mostly against other Masai tribes.

In the course of these wars he received his share of the loot. He was apparently allowed to keep the cattle he himself captured.

Sanguk's brother, the Plaintiff, in due course became a Moran, and in accordance with custom was given a few cattle to take with him to the Moran village. This now amounts to 14 head, with 2 donkeys.

The Defendant and his friends admit the cattle belong to Plaintiff, but only so long as he remains with Defendant's tribe, the Purko. Should he elect to leave them it is maintained by the defence that he must go in the same state in which he came, *i.e.*, without any property.

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The Plaintiff left the Purko Moran a few months ago, and has brought this case in respect of cattle he was forced to leave with them.

It was no doubt formerly the custom for a tribe which had been badly beaten in war and lost all their possessions to remain for ever with their conquerors, and to fight on their side in subsequent wars. They were more or less in the position of slaves, and stopped where they were for the very good reason that they were unable to do anything else. If they attempted to rejoin their former tribe they were probably killed, or in any case had to abandon all their property.

In these days of peace, if not of goodwill, it would not appear clear to the uninitiated why any objection should be raised to the Plaintiff leaving the Purko and joining his former tribe. I think, however, there is no doubt that the Masai generally, and in particular the Purko, who are the strongest, have not given up all hope of military glory, and think that a return to the days of inter-tribal warfare is within the bounds of possibility. The Moran organisation is solely a military one, and is still maintained on a war footing. This being so, the Purko naturally object to any reduction in their fighting strength, especially if it adds to the strength of a potential enemy.

No particular objection seems to have been taken to the brother Sanguk, who is now an old man, rejoining his tribe and taking with him the property he had managed to accumulate. The case of a Moran is, however, regarded in a different light.

In my opinion, the custom as urged by the defence has to a great extent become obsolete, and if it has not entirely, its continuation ought not to be encouraged by the Administration.

I hold that the Plaintiff, in law and according to civilised customs, is entitled to the property claimed, and I find for him with costs.

The Defendant appealed to the High Court, which, after directing further evidence to be taken as to the custom, allowed the appeal.

BONHAM-CARTER, Ag. C.J.—It appears that Masai cattle are not the subject of absolute ownership, but are, in fact, subject to certain communal laws, and that a Moran, if he wishes to leave his tribe, even if he is allowed to go, may not weaken the wealth of the tribe by taking his cattle with him. I am satisfied that this is a custom which was of the force of law, and I do not think it has been abandoned to any great extent. This custom is of value to the tribe for the purpose of conserving its fighting strength, and

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may have injurious effects on the policy of the Administration in several ways, but I do not think it can in any way be considered repugnant to justice and morality.

In this case the Plaintiff is of the Damat tribe, who as a child had been captured by the Purko tribe. His cattle were obtained by his elder brother serving with the Purko, and were Purko communal cattle. The plaintiff now wishes to return to the Damat tribe, taking the cattle with him. He is in the same position as a Purko Moran as regards these cattle, and the custom forbids him to leave with the cattle. I consider it a valid custom. The appeal is allowed with costs, and the cattle, if they have been given to the Plaintiff, must be returned to the Defendant.

(*Appeal allowed.*)

ORIGINAL CIVIL.

Before BONHAM-CARTER, Ag. C.J.

G. O. ADAMS *v.* N. THORNE. O.C. $\frac{39}{1914}$ (November, 1914).

Costs, taxation of—Appeal from Deputy Registrar—Advocate sueing under power of attorney.

Held :—An advocate sueing under a power of attorney cannot charge for "instructions" given to himself, nor for attending to sign papers.

A. F. Macrae, for Plaintiff.

W. W. Cresswell, for Defendant.

The facts appear in the judgment of the High Court.

BONHAM-CARTER, Ag. C.J.—This is an appeal from the Deputy Registrar at Nairobi fixing the costs at Rs. 156/75.

The facts are that the Plaintiff, Gerald Oliver Adams, gave a power of attorney to Mr. Macrae, and under that power Mr. Macrae sued the Defendant. Mr. Macrae is an advocate of this Court, and in the action did work as an advocate. It is contended that such work cannot be charged against the Defendant.

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The general principle seems to be clearly and firmly laid down in *London Scottish Benefit Society* v. *Chorley* (1), and I cannot do better than adopt the judgment of the Master of the Rolls in that case. I consider that an advocate appearing under a power of attorney is in the same position as a solicitor appearing in person.

The Master of the Rolls said: "When an ordinary litigant appears in person, he is paid only for costs out of pocket. He cannot himself take every step, and very often employs a solicitor to assist him. The remuneration to the solicitor is money paid out of pocket. He has to pay the fees of the Court, that is money paid out of pocket; but for loss of time the law will not indemnify him. When, however, we come to the case of a solicitor, the question must be viewed from a different aspect. There are things which a solicitor can do for himself, but also he can employ another solicitor to do them for him, and it would be inadvisable to lay down that he shall not be entitled to ordinary costs if he appears in person, because in that case he would always employ another solicitor. If a solicitor does by his clerk that which might be done by another solicitor, it is a loss of money, and not simply a loss of time, because it is work done by a person who is paid for doing it. It is true, however, to say that the costs of a solicitor appearing in person must be taxed differently from those of an ordinary litigant appearing by a solicitor. The unsuccessful adversary of a solicitor appearing in person cannot be charged for what does not exist; he cannot be charged for the solicitor consulting himself, or instructing himself, or attending upon himself. The true rule seems to be that when a solicitor brings or defends an action in person he is entitled to the same costs as an ordinary litigant appearing in person, subject to this restriction, that no costs which are really unnecessary can be recovered. Of this kind are the costs of instructions and attendances."

This I consider to be the true rule here, and I consider that "instruction to sue" should not be allowed, as these were in the action given by Mr. Macrae to himself. The instructions given to Mr. Macrae by Mr. Adams were given to Mr. Macrae as attorney, and not as advocate. "The attending to sign papers" is one of the items expressly excluded by *London Scottish Benefit Society* v. *Chorley*, and that also must be disallowed. The costs are reduced from Rs. 156/75 to Rs. 121/75.

(*Disputed items struck out.*)

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(1) 13 Q.B.D., p. 872.

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ORIGINAL CIVIL.

Before EHRHARDT, J..

'ICANA HANDELSGESELLSCHAFT *v.* 1. EBRAHIM KASSAM KHATA AND 2. AMUSI KURJI & Co.

O.C. $\frac{173}{1914}$ (December, 1914).

Right of alien enemy to sue—Royal Proclamation of 9th September, 1914, as to trading with the enemy.

Held :—That while, if pleaded by a defendant, the status of alien enemy disentitles a plaintiff from suing, the Royal Proclamation of 9th September, 1914, enables a defendant to pay a debt due to an alien enemy incurred before the war without being guilty of trading with the enemy.

Atkinson, for Plaintiff.

Dalal, for First Defendant.

EHRHARDT, J.—This is an action under Chapter XXXIX of the Criminal Procedure Code on a promissory-note for Rs. 2,000 drawn by the first Defendant and endorsed by the second Defendant.

The Plaintiff Company acknowledges in its plaint that its status is that of an alien enemy, and that the Defendants are British subjects. The first Defendant admits indebtedness, but in consideration of circumstances due to the state of war asks that he may be allowed to pay by instalments of 5 per cent. per month. The second Defendant did not appear when the case was called on, and does not appear to have been served. The situation raises interesting points as to what judgment the Court ought to give in the circumstances. It is, in my opinion, clear law that the status of an alien enemy attaching to a plaintiff, if it is pleaded by a Defendant, disentitles him from having recourse to the Court for the purpose of enforcing a claim unless he can show that he has a licence granted by the King or other duly qualified authority to trade or reside within the realm.(1) At common law, and apart from any licence or other expression of the King's pleasure to the contrary, it would be unlawful and a criminal offence for the Defendant in a case like the present to pay the amount claimed to the Plaintiff.

(1) *Vide* Section 430 of the Civil Procedure Code.

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In September last however a Proclamation was made by His Majesty which enabled British Subjects to pay debts to alien enemies incurred before the outbreak of war without being deemed to be trading with the enemy. I hold, therefore, that if the Defendants in this case are willing to pay they may do so. If, however, the Defendants had claimed the advantage due to the Plaintiff's rights being suspended during the war, I should have upheld the claim. The Proclamation published here on September 16th was issued primarily as a warning to British subjects in the matter of trading with the enemy. It must be construed in the light of that particular purpose. It does not purport to, and in my judgment does not in fact confer on alien enemies anything of the nature of a licence to reside or trade here. Much less does it, in my opinion, abridge the rights of British subjects when sued by an alien enemy. To do that something more than a Proclamation would be necessary. At home an Act of Parliament has been passed allowing alien enemies to reside in certain districts on condition of their registering themselves. On compliance with that condition they are, by a well-known principle of law, entiled to the same privileges and treatment as other foreigners. We have no corresponding Ordinance in this Protectorate, nor, so far as I know, have any provisions been made for granting to alien enemies any general licence to reside or trade here which would entitle them to be treated as alien enemies are being treated at home in consequence of the Act of Parliament referred to.

As the first Defendant in this case has not taken advantage of his right to plead the fact of the Plaintiff's being an alien, but has offered to pay instalments at the rate of 5 per cent. per month, I give judgment for the Plaintiff for the amount claimed, with costs, and direct that the decretal amount be paid in monthly instalments of 5 per cent., the first instalment to be payable on December 8th.†

(Judgment for Plaintiff accordingly.)

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† Reported by EHRHARDT, J.

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APPELLATE CRIMINAL.

Before BONHAM-CARTER, Ag. C.J., and EHRHARDT, J.

GEORGE ROBERTS *v.* REX. Cr.A. $\frac{32}{1914}$ (December, 1914).

Merchant Shipping Act, 1894, Section 225 (*c*) Articles signed before war—Outbreak of war opportunity to cancel—Variation of contract—Waiver.

Held :—A sailor who signs articles with knowledge that war is imminent, and who, when the ship is chartered by the Admiralty, is given the opportunity of cancelling his contract and does not do so, must be held to have waived any right that he may have had because of the variation of the contract.

Appellant unrepresented.

O. Daly, for the Crown.

The Court delivered the following joint judgment :—

This is an appeal by one George Roberts from a sentence of the Town Magistrate, Mombasa, of four weeks' imprisonment and a forfeiture of £4 of pay for an offence under Section 225 (*c*) of the Merchant Shipping Act, 1894, that is to say, "of continued disobedience to any lawful command." The Accused was sentenced on October 2nd, 1914, and has completed his sentence and left the country, and the ship on which he was serving has since been sunk.

The steamer *Newbridge* was under ordinary articles, which expired on 8th August, 1916.

At the end of July she was in Durban Harbour, and on the 4th August Roberts signed on the ordinary articles. After signing on he knew that war had broken out, and that the ship was carrying coal for the Admiralty.

The ship left Durban on August 8th, and arrived at Mombasa on September 1st. About September 17th Roberts and several others demanded higher wages, and on this not being granted they struck work.

It is perfectly clear to me that Roberts knew that war was imminent when he signed the articles, and that he knew that it had been declared, and the fact that the ship had been chartered by the Admiralty before he left Durban, and that he had been given an opportunity to cancel his contract there and he did not do so. He must be held to have waived any right he may have had under the claim that the contract had been varied. On that ground I consider the appeal must be dismissed.

(*Appeal dismissed.*)

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APPENDIX.

RULES OF COURT.
(6 OF 1911).

NOTICE UNDER.

The Schedule to Rules of Court No. 6 of 1911 is hereby amended in so far as it relates to the Province of Naivasha to read as follows:—

Area.	Place of Registry.	District Registrar.
Province of Naivasha, except the Uasin Guisho District	Nakuru	Town Magistrate, Nakuru.
Uasin Guisho District	Eldoret	Town Magistrate, Eldoret.

Mombasa,
11th December, 1913.

(*Signed*) R. W. HAMILTON,
CHIEF JUSTICE.

RULES OF COURT (LEGAL PRACTITIONERS)
(2 OF 1911.)

NOTICE UNDER.

Notice is hereby given that any agreement required to be filed pursuant to Rule XII of the above mentioned Rules may be filed in the High Court or in a District Registry of the High Court within one month from the date of the agreement.

Mombasa
7th January, 1914.

(*Signed*) R. W. HAMILTON,
CHIEF JUSTICE.

OFFICE RULES.

REFERENCE TO AND PRODUCTION OF ARCHIVES.

The attention of Advocates is drawn to Section 137 of the Civil Procedure Code and Section 74 of the Indian Evidence Act: These sections governing the production of the Court Records as evidence in a case proceeding in the High Court or any Court subordinate thereto. The practice laid down in the sections referred to will be rigidly adhered to in future.

Inspection of Records will only be allowed on reasonable notice, and only in the presence of an Officer of the Court.

The number, year, and parties' names must be stated in any application for reference to the archives. If this is not done Rs. 2 will be charged for each year against which a search is asked for.

H. M. High Court of East Africa
Mombasa, 24th July, 1914.

W. S. WRIGHT,
REGISTRAR, HIGH COURT.

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CIRCULAR TO MAGISTRATES.
(1 OF 1913.)

PROCEEDINGS AGAINST NATIVES IN HUT AND POLL TAX CASES.

1. In proceedings against natives for the recovery of Hut and Poll Tax many Magistrates adopt the procedure of making one file and charging any number of natives together in the same proceedings.

2. This is incorrect, as the non-payment by A has nothing whatever to do with the non-payment by B, and it may, in a crowd of twenty accused natives, act to the prejudice of one or two who may have good reasons to urge in their defence.

3. As, however, the opening of separate files in all such cases would entail an unnecessary expenditure of time and trouble on the part of the Court, the High Court will be satisfied if the following procedure is adopted:

4. Where more natives than one are charged at the same sitting of the Court with failure to pay Hut or Poll Tax one file may be opened, but each individual case must be dealt with separately, and the Magistrate's notes to it recorded on a separate sheet of paper, to be placed in the file and numbered in a sub series under the number of the file.

Any further references to an individual case would be made by quoting the number of the file and of the sub-series, *e.g.*, "Criminal Case 57 of 1913, sub-case 3."

5. Magistrates are reminded that there is no power to fine under Section 2 of Ordinance (5 of 1912), but that the payment of costs may be ordered, which, if paid, should be credited to Court fees, and not to fines.

H. M. High Court of East Africa,
Mombasa, 16th January, 1913.

R. W. HAMILTON,
CHIEF JUSTICE.

MEMORANDUM.

FOR THE INFORMATION OF MAGISTRATES CONCERNED.

The enclosed sample copy of a form for use under the Non-Native Poll Tax Ordinance has been approved by the Chief Justice for use in Magistrates' Courts.

The District Commissioner should be entered as Plaintiff.

In places where there is a Town Magistrate the following procedure, which has been adopted in Mombasa, should be followed:—

The District Commissioner will fill in the names of the persons to be summoned on forms such as that provided, and will send the same to the Town Magistrate for issue.

The Town Magistrate, on receiving a summons for issue, will fix the date for hearing, and notify the District Commissioner accordingly.

Printed forms will be supplied as soon as available.

H. M. High Court of East Africa,
Mombasa, 13th February, 1913

W. S. WRIGHT,
REGISTRAR, HIGH COURT.

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Summons to show cause why payment of the Non-Native Poll Tax should not be ordered as a judgment debt Section 9 of Ordinance No. 19 of 1912.

Civil No. 42.

EAST AFRICA RROTECTORATE.

IN THE.....COURT

AT.....

CIVIL CASE NO. OF 191 .

.....
.....
} *Plaintiff*

versus

.....
.....
} *Defendant*

To.....

.....

WHEREAS payment of a Tax of Rs.....being the amount of the Non-Native Poll Tax was due by you on or before the..... .....day of.....191 .

AND WHEREAS you have made default in the payment of the said Tax this is to give you notice that you are to appear before this Court on the..... day of.....191 , at.....o'clock in the.....noon in person or by an Advocate of this Court or agent duly authorised and instructed to show cause if any why you should not be ordered to pay the said amount of Rs.....together with Rs.....the costs of this summons as a Judgment Debt.

Given under my hand and the seal of the Court, this..... day of.....191 .

MAGISTRATE,
East Africa Protectorate

Amount of Tax	Rs.....
Issue of Summons	Rs.....
Service of Summons	Rs.. .....
Total amount due	Rs.

IN ACCORDANCE WITH RULE 3 ISSUED UNDER THE NON-NATIVE POLL TAX ORDINANCE, 1912.

If you wish to be excused from attending before the Court you must pay the above sum into Court before 12 noon on the..... .....day of.....191 .

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CIRCULAR TO MAGISTRATES.
(2 OF 1913.)

LENGTH OF TERM OF DETENTION IN REFORMATORY.

The subjoined extracts from the report of the Superintendent of the Reformatory, dated November, 1912, are circulated for the information of Magistrates. With reference particularly to the second extract, Magistrates are requested to remember that the object of the Reformatory is to improve a boy's character and make him steady and reliable, and this is more likely to be effected, particularly in the case of younger boys, by a somewhat longer term of detention than the minimum of two years.

H. M. High Court of East Africa. R. W. HAMILTON,
Mombasa, 15th February, 1913. CHIEF JUSTICE.

EXTRACTS FROM SUPERINTENDENT'S REPORT.

" Since its institution in February, 1909, 59 boys have been enrolled, and the figures, at present, are:—

40 In residence.
8 Have been released on completion of sentence.
3 Are at present at large.
2 Have been released by Order of His Excellency the Governor.
2 Have been sent to Nairobi Prison.
2 Have died.
2 Are at present in the Prison Hospital, Nairobi.

59 Total.

" A sentence of two years is sufficient to make such a boy useful, but it is scarcely long enough to make him reliable. I strongly advocate a medium sentence of four years, which will produce a much more satisfactory youth at the end of that period."

CIRCULAR TO MAGISTRATES.
(3 OF 1913.)

SERVICE OF CIVIL SUMMONSES BY POLICE ON EUROPEANS.

1. As the Police lend the assistance of European Officers for the service of Summonses in Civil cases, particularly in those areas in which the Defendants are Europeans living at a considerable distance from the Court of issue, the cost of such service must be borne by the party at whose instance the summons is served.

2. Hitherto there has been considerable uncertainty as to the rate that should be charged for such service, and in consequence the scale below has been agreed between the Commissioner of Police and this Department.

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3. As the number of the Police Force is small, Magistrates are particularly requested to arrange that in matters which are not urgent, service by the Police in outlying areas should, if possible, be effected by them when on ordinary patrol duty, as this obviates the necessity of detaching men for special duty.

The Police will keep Magistrates informed as to the dates and routes of ordinary patrols.

H. M. High Court of East Africa,
Mombasa, 3rd March, 1913.

R .W. HAMILTON,
CHIEF JUSTICE.

SCALE OF CHARGES.

			Rs. Cts.	
Special Service	(*a*)	When distance does not exceed 3 miles from Police Post from which served ...	1—00	
Special Service	(*b*)	When distance exceeds 3 but not 6 miles from Police Post from which served ...	2—00	
Special Service	(*c*)	When distance exceeds 6 but not 12 miless from Police Post and when special journey is mode	7—00	
Special Service	(*d*)	For every 8 miles or part thereof exceeding 12 miles, when special journey is made		An additional Rs. 7/50 plus any expenses certified to by the Senior Police Officer of the District in connection with fitting out a safari.
Special Service	(*e*)	If duty necessitates journey by rail		Rs. 7/50 for each day or part thereof Constable is absent plus cost of Railway ticket and ticket for (servant)
Patrol Service	(*f*)	For service outside 3 miles area in ordinary course of Police patrols *i.e.*, when no special journey is made ...	1—00	

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CIRCULAR TO MAGISTRATES.
(4 OF 1913.)

STOCK AND PRODUCE THEFT ORDINANCE (8 OF 1913).

The Government having required the High Court to collect information for H. M. Secretary of State as to the working of the above Ordinance, Magistrates are requested to observe the following procedure:—

1. When trying cases under the Ordinance evidence should always be recorded as to the value of the " Stock " or " Produce " stolen, and in the event of a conviction the sentence should clearly show the amount of fine imposed and its apportionment between the persons convicted if there are more than one.

It should be remembered that a Third Class Subordinate Court cannot impose a fine exceeding Rs. 200.

2. Where the fine is not forthwith paid, a warrant of distress should be issued, and if no property, or insufficient property, of the offender, is found to satisfy the fine, the warrant should be forwarded by the trying Magistrate to the Provincial Commissioner of the Province in which the family, sub-tribe or tribe of the offender is resident, together with a report on the case and a statement of the amount of fine, if any, levied, so as to enable the Provincial Commissioner to satisfy himself whether the circumstances of or in connection with the offence are such as to render it desirable in his opinion that further steps should be taken.

3. A Provincial Commissioner, on receiving a warrant of distress and report from a Magistrate as aforesaid, should, if he thinks fit to take no further action, endorse his decision on the warrant, together with his reasons for refusing to proceed, and return the same to the trying Magistrate.

4. Should a Provincial Commissioner decide to take further steps towards levying the amount stated in the warrant, he will endorse it accordingly, and either return it to the trying Magistrate for execution or forward it to the Magistrate of the District where it is to be levied, with instructions to return it, further endorsed with the manner of execution, to the Court from which it issued.

5. Should a Provincial Commissioner think fit to call upon the head of the offender's family, or the headman of his sub-tribe, to show cause why the warrant should not be executed, or to hold any other enquiry, a memorandum of any enquiry so held, together with the Provincial Commissioner's decision thereon, should be attached to the warrant before the warrant is forwarded, in accordance with the foregoing section.

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6. When a warrant of distress has been returned to the Court from which it issued, endorsed by the Provincial Commissioner, for no further execution, or when it has been returned to the trying Magistrate for execution, and has been executed, the trying Magistrate will forward a copy of the warrant and its endorsements, of his report on the case, and of any memoranda by the Provincial Commissioner relating to the execution, to the Registrar of the High Court.

7. The above procedure in no way affects the ordinary procedure, when a sentence requiring confirmation by the High Court is passed. Such sentence must be confirmed before any steps in execution are taken.

8. The returns of all cases tried under the Ordinance must distinguish carefully between " Stock " and " Produce."

Where an offender charged under the Ordinance is discharged or acquitted no further information is required beyond that contained in the ordinary monthly returns.

High Court,
Mombasa, 10th July, 1913.

R. W. HAMILTON,
CHIEF JUSTICE.

CIRCULAR TO MAGISTRATES.
(5 OF 1913.)

RECOVERY OF FINES.

1. As questions have been raised recently concerning fines that have been imposed by Magistrates and have not been collected, it is requested that in future in all cases where a fine remains unpaid an entry should be made in the " Judicial Fines Book" in the column reserved for remarks, showing why a fine, if unpaid or only partly paid, has not been collected in full.

2. The issue of a warrant for the levy of a fine is discretional with the Court passing the sentence.

3. The attention of Magistrates is directed to Circular 4 of 1912.

Mombasa,
8th August, 1913.

(*Signed*) R. W. HAMILTON,
CHIEF JUSTICE.

CIRCULAR TO MAGISTRATES.
(6 OF 1913.)

Owing to representations as to the frequent omission of particulars on warrants sent to the police for execution, the attention of Magistrates is particularly requested to Circular 2 of 1911.

H. M. High Court of East Africa,
Mombasa, 25th November, 1913.

R. W. HAMILTON,
CHIEF JUSTICE.

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CIRCULAR TO MAGISTRATES.
(7 OF 1913.)

FLOGGING.

His Excellency has approved as an instrument for flogging, canes of the pattern now supplied to all prisons, and the "cat" is no longer to be used.

Magistrates are therefore requested in those cases in which a flogging is considered necessary to order so many strokes with the cane, regard being had in all instances to previous Circulars on the subject of flogging.

When the person who is ordered to receive a flogging is a juvenile the fact should be so noted on the Returns.

Mombasa,
26th November, 1913.

R. W. HAMILTON,
CHIEF JUSTICE.

CIRCULAR TO MAGISTRATES.
(8 OF 1913.)

SENTENCES ON MEMBERS OF THE POLICE FORCE.

As Magistrates may not be aware of the consequences entailed by a sentence of imprisonment passed on a member of the Police Force, they are requested to note that a sentence of imprisonment, of whatever nature, whether for an offence under the Police Ordinance or any other law, involves dismissal from the Force.

Mombasa,
8th December, 1913.

R. W. HAMILTON,
CHIEF JUSTICE.

CIRCULAR TO MAGISTRATES AND JUSTICES OF THE PEACE.
(1 OF 1914.)

PARTICULARS TO BE INSERTED IN WARRANTS OF ARREST.

1. Attention is requested to the necessity of inserting in warrants sent to the Police for execution sufficient particulars to enable the Police to trace the person whose arrest is required.

2. Although previous Circulars on this subject have been issued both in 1911 and 1913, the Police had on their hands at the end of 1913, 82 unexecuted warrants of arrest. Of these no less than 78 contained no particulars whatsoever to enable the Police to identify and trace the persons wanted.

3. A warrant to arrest, "Ogolo, Kavirondo," for instance, is practically useless; and pains should always be taken to add to a warrant any information that is available to assist the Police in finding the person therein named.

H. M. High Court of East Africa,
Mombasa, 3rd February, 1914.

R. W. HAMILTON,
CHIEF JUSTICE.

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CIRCULAR TO MAGISTRATES.

(2 OF 1914.)

COMMITMENT FOR TRIAL.

1. With reference to Circular 1 of 1910, the observance of the instructions contained in paragraphs 2 and 4 is particularly requested.

2. When an accused person is committed for trial the charge or charges relating to the offence or offences on which he is committed for trial must be carefully drawn up by the Committing Magistrates with all necessary particulars.

3. When the records are forwarded by the Committing Magistrate to the High Court before being copied it is essential that a full memorandum be retained by the Magistrate, containing the names and addresses of all persons whose attendance is required at the trial.

4. If this is not done there is a great danger of the trial breaking down altogether or being unnecessarily delayed through mistakes or omissions in sending in witnesses to the place of trial.

H. M. High Court of East Africa,
Mombasa, 5th May, 1914.

R. W. HAMILTON,
CHIEF JUSTICE.

CIRCULAR TO MAGISTRATES.

(3 OF 1914.)

RETURNS OF CONVICTIONS UNDER STOCK AND PRODUCE THEFT ORDINANCE.

1. With reference to the instructions contained in Circular 8 of 1913, Magistrates are requested to report at once any case dealt with by them under the Ordinance since its coming into force in July, 1913, in which a warrant of distress has been issued, and the proceedings thereunder, if such proceedings have not already been reported to the High Court in accordance with the circular referred to.

This report should refer in each instance to the case number in the Magistrate's register.

2. Magistrates are further requested to notify the High Court in all cases already dealt with by them under the Ordinance in which the fine has been paid or partly paid by the convict himself without a warrant of distress having been issued.

In future such payments should be noted on the monthly returns.

H. M. High Court of East Africa,
Mombasa, 11th May, 1914.

R. W. HAMILTON,
CHIEF JUSTICE.

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CIRCULAR TO MAGISTRATES.
(4 OF 1914.)

In view of the present conditions of trade in this Protectorate Magistrates are requested to take especial care that their orders in execution in Civil Cases are not oppressive.

Payment by instalments should be granted in suitable cases, and imprisonment for debt only ordered where the Magistrate is clearly of opinion that the debtor is wilfully obstinate.

H. M. High Court of East Africa,
Mombasa, 25th November, 1914.

A. T. B. CARTER,
ACTING CHIEF JUSTICE.

CIRCULAR TO MAGISTRATES.
(5 OF 1914.)

Your attention is called to Section 400 of the Criminal Procedure Ordinance of 1913, which will come into force on January 1st, 1915.

The Governor has appointed an Officer called the Officer-in-Charge Finger Print Bureau, Nairobi, to be the Officer referred to by the Section, and has prescribed a form in the *Gazette* of December 2nd, 1914.

When it is necessary to prove a previous conviction by finger prints a certificate in the form prescribed, signed by the Officer-in-Charge Finger Print Bureau, if it is produced by the person who took the finger prints of the accused shall be *prima facie* evidence of all matters contained therein.

H. M. High Court of East Africa,
Mombasa, 8th December, 1914.

A. T. B. CARTER,
ACTING CHIEF JUSTICE.

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LAW REPORTS.

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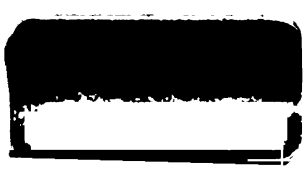

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